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No. _____

IN THE
Supreme Court of the United States

REGINALD CLEMONS, ET AL.,
Petitioners,

v.

LARRY CRAWFORD, ET AL.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

In this case, Petitioners challenged the constitutionality of the manner in which the State of Missouri implements its written lethal injection protocol. Petitioners' complaint provided detailed allegations of incompetence and malfeasance in the immediate past by state execution personnel, including the substantial and arbitrary reduction of thiopental, the anesthetic that is necessary to ensure that an execution is humane and thus lawful under *Baze v. Rees*, 553 U.S. 35 (2008). The district court granted Respondents' Motion for Judgment on the Pleadings in its entirety, holding that this Court's decision in *Baze* precluded Petitioners' claims. On appeal, the United States Court of Appeals for the Eighth Circuit affirmed, holding that allegations of incompetence on the part of current and past Department of Corrections ("DOC") personnel in Missouri were insufficient to state a claim. The question presented is:

1. Whether a plaintiff states a claim in a method-of-execution challenge where he alleges a substantial risk of serious harm due to incompetent and untrained personnel, where his complaint includes detailed allegations of incompetence by the state's execution personnel and administrators in the immediate past.

LIST OF PARTIES

Pursuant to Rule 14.1(b), the following list identifies all of the parties before the United States Court of Appeals for the Eighth Circuit.

Reginald Clemons, Richard D. Clay, Jeffrey Ferguson, Roderick Nunley, Michael Anthony Taylor, Martin Link, William Rousan, Mark Christeson, John Charles Middleton, Russell Earl Bucklew, and Earl Ringo, Jr. were all appellees below. Appellants were Larry Crawford, Director, Missouri Department of Corrections; James D. Purkett, Superintendent, Eastern Reception, Diagnostic and Correctional Center, Missouri Department of Corrections; Terry Moore, Director of Adult Institutions, and John Does 1-50, anonymous executioners.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Reginald Clemons, Russell Bucklew, Richard D. Clay, Jeffrey Ferguson, John Middleton, Roderick Nunley, Michael Anthony Taylor, Martin Link, Earl Ringo, Jr., William Rousan, and Mark Christeson respectfully request this Court to issue a writ of certiorari to review a decision of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit, reported at 585 F.3d 1119 (8th Cir. 2009), is reprinted at Pet. App. 1a. The decision of the United States District Court for the Western District of Missouri, unreported No. 07-cv-4129, 2008 WL 2783233 (W.D. Mo. July 15, 2008), is reprinted at Pet. App. 20a. The order of the Eighth Circuit denying rehearing and rehearing *en banc*, is set forth at Pet. App. 32a.

JURISDICTION

The Court of Appeals' judgment was entered on November 10, 2009. A timely petition for rehearing and rehearing *en banc* was denied on December 22, 2009. On March 10, 2010, Justice Alito granted a 30-day extension to file a petition for certiorari. Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Eighth Amendment to the Constitution: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

STATEMENT OF THE CASE

A. Introduction

Petitioners Reginald Clemons, Richard D. Clay, Jeffrey Ferguson, Roderick Nunley, Michael Anthony Taylor, Martin Link, William Rousan, Mark Christeson, John Charles Middleton, Russell Bucklew, and Earl Ringo, Jr. are inmates sentenced to death in the State of Missouri. After the Attorney General moved to set execution dates for ten inmates, including five of the Petitioners, Petitioner Clemons requested that the DOC provide information about the qualifications of its execution personnel. In response, the DOC stated that it had not yet designated its team, and that therefore, it had no documentation on the execution personnel's qualifications and licensing information. The DOC's response thus revealed that the State had moved for executions without ensuring it had team members, let alone qualified, trained team members, in place to carry out those executions.

Based on this information, as well as discovery from earlier litigation revealing gross incompetence on the part of the DOC's most recent execution team, Petitioners concluded that the DOC planned to employ an execution team on short notice, without adequate screening or training. Accordingly, on July 9, 2007, Petitioners filed this suit in the Western District of Missouri, alleging that the DOC does not employ competent personnel to carry out the State's written lethal injection protocol, and that implementation of this protocol by unqualified and untrained personnel subjects Petitioners to a substantial risk of excruciating pain in violation of

the Eighth Amendment's ban on cruel and unusual punishment.[1]

B. Missouri's Lethal Injection Protocol

Under Missouri law, complete responsibility for designing and implementing execution procedures is delegated to Defendant Crawford in his capacity as Director of the DOC.[2] *See* Mo. Rev. Stat. § 546.720. In the mid-1990s, in response to a botched execution attempt, Crawford delegated responsibility for designing and implementing its lethal injection executions to a licensed, board-certified surgeon, John Doe I ("Doe I" or "Doe").

Under Doe's leadership, the DOC, like all other States employing lethal injection, adopted use of a three-drug cocktail designed to cause death quickly and without visible movements. Pet. App. 43a. Thiopental, the first drug injected, is an ultrashort-acting anesthetic that must be mixed into solution shortly before it is used. *Id.* The second drug, pancuronium, masks all visible suffering by paralyzing the inmate's muscles. It does not reduce

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[1] Petitioners Clemons, Clay, Ferguson, and Nunley filed the complaint in this case. Pet. App. 34a. The District Court subsequently permitted Petitioners Taylor, Link, Christeson, and Rousan to intervene as plaintiffs. Docket Entries, *Clemons v. Crawford*, Case No. 07-4129-cv-C-FJG (W.D. Mo) ("Dkt. Nos.") 24, 69. The district court denied as moot motions to intervene by Petitioners Middleton, Bucklew, and Ringo Jr. upon granting judgment on the pleadings to Respondents. Dkt. No. 89.

[2] Director Crawford served in that capacity through January 29, 2009, at which point George Lombardi was confirmed as the new Director after being nominated by Missouri's new governor. Lombardi remains the current Director of the DOC.

consciousness of pain. *Id.* The last drug injected, potassium, induces cardiac arrest. When administered in concentrations sufficient to stop the heart, potassium causes an excruciating burning sensation in the veins. *Id.*

Because both pancuronium and potassium inflict extreme suffering if injected into a conscious person, the induction of general anesthesia is crucial to an execution consistent with the Eighth Amendment as this Court applied it in *Baze*. Absent a proper dose of sodium thiopental sufficient to render the prisoner unconscious, "there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride." *Baze v. Rees*, 553 U.S. 35, 53 (2008). Accordingly, if the injection of the intended dose of thiopental is not completely successful, or does not result in deep anesthesia, there is a substantial risk of excruciating pain in violation of the Eighth Amendment. Pet. App 49a.

C. The *Taylor* Litigation

In 2005, Michael Anthony Taylor brought a lawsuit challenging Missouri's procedure for carrying out executions by lethal injection, asserting that the DOC's methods created an unconstitutional risk of excruciating pain in violation of the Eighth Amendment. Pet. App. 45a. At the time, Missouri had no written protocol but rather carried out its procedures in an *ad hoc* manner. *Id.* at 42a-43a. DOC officials delegated complete responsibility for implementing its execution procedure to Doe I – the head executioner – and remained ignorant of, and

indifferent to, Doe's actions on execution nights. *Id.*

During discovery, Taylor learned that Doe I had planned to administer half or less of the amount of thiopental required under the DOC's unwritten *ad hoc* procedure. *Taylor v. Crawford,* 05-4173-CV-C, 2006 WL 1779035, at *7-*8 (W.D. Mo. June 26, 2006); Pet. App 46a. Doe stated that his concern in implementing the execution procedure was to make the DOC "look[] good" by performing executions "with no apparent suffering that the public can observe," so that execution witnesses would not question the State's execution process. *Id.* at 47a-48a.

Consistent with that goal, the evidence obtained in discovery demonstrated that Doe I varied crucial elements of the procedure in a dangerous manner. *Id.* at 46a-48a. Doe I had no training in anesthesia and was unable to calculate or keep track of doses of drugs because he was dyslexic. *Id.* at 47a-48a. It was clear, however, that Doe I had altered the amount of thiopental administered during the execution of other inmates, providing lower doses than what was required under the *ad hoc* procedures. *Id.* at 46a. Doe I's inaccurate records, however, coupled with the paralyzing effects of the pancuronium, made it impossible to determine with any reasonable certainty how much thiopental was administered to other inmates, or whether any of these inmates were properly anesthetized or instead suffered an excruciating death. *Id.* at 43a, 46a-48a. Evidence also revealed that the DOC's other execution team members, who worked under Doe I's supervision, lacked sufficient training and

qualifications to ensure that executions were performed properly or to alleviate Doe I's errors. *Id.* at 56a. The team's problems were exacerbated by the fact that DOC administrators did not understand the medical aspects of the lethal injection procedure and failed to oversee Doe's administration of the lethal injection protocol. Indeed, the DOC's oversight was so poor that it repeatedly overstated in judicial proceedings the amount of thiopental that was administered to executed inmates. *Id.* at 45a-47a. Remarkably, it was later revealed that the DOC had continued to employ Doe I despite knowing he had "medical licensure problems and [a] problematic malpractice history," that included the fact that he was barred from practicing at two Missouri hospitals. *Id.* at 42a-43a.

In response to the evidence revealing the systemic flaws in Missouri's execution process, the *Taylor* district court issued an injunction enjoining all executions in the state, required the DOC to adopt a written protocol that provided for proper monitoring of anesthetic depth by a qualified anesthesiologist, and held that Doe I could no longer take part in executions in the state of Missouri. *Id.* at 48a-49a. In response, the DOC proposed a written protocol, but it failed to implement the district court's other mandated reforms. *Id.* at 50a-54a. Instead, the DOC appealed, arguing that its written procedures did not impose a constitutional risk of pain. *Id.* at 54a.

On appeal, the DOC expressed confidence in its new written protocol, and in Doe I's ability to properly perform executions going forward. Brief of Appellants at 63-66, *Taylor v. Crawford*, No. 06-3651

(8th Cir. Dec. 4, 2006). The Eighth Circuit reversed the district court, holding that the DOC's written protocol did not violate the Constitution. *See Taylor v. Crawford*, 487 F.3d 1072, 1084 (8th Cir. 2007). Ultimately, the court concluded that any likelihood of harm caused by unqualified or poorly trained personnel's failure to follow the protocol would violate the Constitution only if execution team members exhibited deliberate indifference or intentionality. *See id.* at 1085. The opinion did not address the extent to which unqualified or improperly trained personnel created a likelihood of unintended yet harmful deviations from the protocol. The opinion also noted that the court had been informed that Doe I was no longer participating in executions. *Id.* at 1077 n.3.

D. The District Court Proceeding

Four days after the Eighth Circuit issued its ruling in *Taylor*, the Attorney General moved to set execution dates for ten inmates, including several of the Petitioners. *See, e.g.*, Pet. App. 38a-39a. Immediately thereafter, Petitioners discovered that the DOC had not yet put an execution team in place despite the fact that removal of Doe I from the execution team left a personnel and expertise vacuum in the DOC. *Id.* at 55a. The DOC's inability or refusal to designate an execution team while simultaneously seeking the execution of Petitioners raised serious concerns about the DOC's commitment to employ qualified individuals and to provide adequate training to ensure that Petitioners' executions would be carried out without imposing a substantial risk of serious harm.

Accordingly, Petitioners brought this action to challenge the constitutionality not of Missouri's *written* protocol, but rather of the method in which the DOC intended to *implement* its protocol. Pet. App. 57a-59a, 59a-62a. Petitioners' allegations were built on both the evidentiary record – adduced in the *Taylor* litigation – exhibiting the gross incompetence with which the DOC had administered its lethal injection procedure in the past, as well as the DOC's current failure to designate, screen, or train an execution team to perform the executions for which it had moved to set dates. *Id.* at 45a-48a, 50a-54a, 55a-57a, 57a-59a, 59a-62a. The crux of Petitioners' contentions was that though Missouri's protocol may be constitutional as written, it will be implemented in an unconstitutional manner. *Id.* at 50a-54a, 55a-57a, 57a-59a, 59a-62a. More specifically, Petitioners alleged that, just as it had in the immediate past, the DOC will retain incompetent individuals who are not qualified or are inadequately trained to implement the protocol as written, and that the faulty implementation that will result creates a substantial risk of severe and unnecessary pain during the execution process in violation of the Eighth and Fourteenth Amendments. *Id.*

Petitioners' complaint was premised on the fact that the DOC has historically employed execution personnel who, despite paper qualifications, have been unable or unwilling to properly perform even the most basic of the critical tasks of the lethal injection procedure. Pet. App. 36a-38a, 46a-48a, 50a-54a, 55a-57a. Such tasks include properly mixing the lethal injection chemicals, measuring out the

correct dose of thiopental, accurately recording the doses injected, and properly setting the IV lines. *Id.* at 46a, 47a-48a.

In light of these documented examples, Petitioners alleged that the DOC would retain additional execution personnel who were incompetent or otherwise unfit to perform their executions. Pet. App. 57a, 58a-59a, 59a-61a. These concerns were further compounded by the fact that Missouri sought execution dates for ten inmates, but had not yet put its execution team in place, and would therefore have to designate team members on short notice and without proper screening procedures. *See, e.g., id.* at 61a. Petitioners alleged that the DOC would not adequately train those individuals it ultimately retained to perform the lethal injection procedure. *Id.* Petitioners further alleged that the DOC's protocol leaves much to the discretion of its execution team and that the practices developed will depend on the competence and training of the execution personnel.[3] *Id.* at 57a, 58a-59a, 59a-61a

In addition, Petitioners' complaint alleged that the DOC continues to suffer from systemic problems in its execution process, including misplaced priorities and official abdication of responsibility over critical aspects of the lethal injection procedure. Pet. App. 51a, 52a-53a. The DOC's priorities have focused on carrying out executions in a manner that avoids

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[3] In addition, subsequent to the filing of the complaint, the St. Louis Post-Dispatch reported that another member of the execution team, Doe II, has a history of violent criminal activity, including a conviction for aggravated stalking. Dkt. No. 35. The DOC has not denied the Post-Dispatch's account.

observable problems, while leading its personnel to believe that executions must be carried out at any cost, even in the face of serious problems such as an inability to properly mix the lethal chemicals. *See, e.g., id.* at 47a-48a.

Immediately upon filing their complaint, Petitioners moved for expedited discovery to ensure they could obtain discovery and could litigate the case to judgment without having to seek stays of execution. Dkt. Nos. 15-16. The district court granted expedited discovery. Dkt. No. 20. In their initial discovery requests, Petitioners sought discovery into the qualifications and background of the execution personnel, including the disciplinary history and training received by execution team members, as well as the execution logs for all executions in which any member of the current team had participated. Dkt. No. 32, at 1, 13-14. Petitioners also sought depositions of all members of the future execution team. *Id.* at 2. In response, the DOC produced a small number of documents, including email correspondence with the State's expert, Dr. Dershwitz, as well as certain documents concerning a training session on lethal injection conducted by the Federal Bureau of Prisons, which also employs Doe I to lead its executions. *See id.* at Exhibit 3; *see also* Henry Weinstein, *Doctor Barred By State Helps in U.S. Executions*, L.A. Times, Nov. 15, 2007, at A-17, available at http://articles.latimes.com/2007/nov/15/nation/na-johndoe15.

The DOC objected to the majority of Petitioners' discovery requests. Dkt. No. 32 at Exhibit 1. The

DOC maintained that Petitioners' requests were irrelevant, or that the materials requested were protected by security concerns or the attorney-client and work-product privileges. *Id.* The DOC also refused to make execution team members available for deposition even though it agreed that Petitioners were entitled to discovery into the qualifications and training of its execution team. Dkt. No. 32 at 3. And the DOC repeatedly asserted that it had not yet designated the execution team. *Id.* at Exhibit 1.

In response to the DOC's failure to respond to discovery requests, Petitioners filed a motion to compel on November 21, 2007. Dkt. Nos. 31-32. On March 17, 2008, the district court granted the motion, recognizing the validity of Petitioners' challenge to the DOC's implementation of its lethal injection protocol and thus the relevance and importance of the discovery Petitioners sought. Dkt. No. 40. In granting the motion, the district court correctly recognized that Petitioners' challenge was not to Missouri's written protocol, but rather to the manner in which the DOC would carry out that protocol, as well as the training and qualifications of those who would implement it. *Id.* Towards that end, the district court ordered the DOC to produce broad categories of relevant information, including documents wrongly withheld on the basis of attorney-client privilege and the work product doctrine, as well as all information related to all prior executions in which John Does II and V participated.[4] *Id.*

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[4] In their responses to Petitioners' First Set of Interrogatories, Respondents represented that John Does II and V, both

Following the district court's order, Petitioners continued to seek expedited discovery. However, they never received any new documents or information. Instead, on April 16, 2008, before Respondents produced any new material, this Court issued its decision in *Baze v. Rees*, 553 U.S. 35 (2008). The very next day, Respondents filed a motion asking the district court to reconsider its order compelling additional discovery. Dkt. No. 44. Respondents argued that *Baze* rendered the additional discovery irrelevant to Petitioners' claims as a matter of law. *Id.* at 5-6. In their reply brief on the motion for reconsideration, Respondents further informed the district court – for the first time – that they had finally selected the execution team, and that the newly designated team included a registered nurse and an anesthesiologist. Dkt. No. 50 at 3. Respondents attached to their brief redacted copies of licensing certificates, but maintained that any other discovery into the qualifications or training of the execution team was per se irrelevant under *Baze*. *Id.* at Exhibit 1. One week later, on April 25, 2008, Respondents filed a motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c), arguing that *Baze* foreclosed Petitioners' claims in their entirety. Dkt. No. 47.

On May 15, 2008, the district court granted Respondents' motion to reconsider its order compelling discovery, finding that "the discovery this Court previously ordered to be provided is no longer

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members of the execution team previously led by Doe I, are likely to participate in future executions. Dkt. No. 32 at Exhibit 2, at 6-7.

relevant in light of the *Baze* decision." Dkt. No. 57 at 1. At the same time, the court reaffirmed the viability of Petitioners' challenge to the implementation of Missouri's protocol, noting that "Defendants . . . admit that some discovery is still relevant under the *Baze* decision." *Id.* Accordingly, the district court emphasized Respondents' commitment to produce both "credentials and licensing documents for the registered nurse and the anesthesiologist who have recently been added to the execution team," as well as "information regarding the training that will be provided to the execution team members." *Id.* at 1-2.

In response to this Order, Petitioners expeditiously availed themselves of the limited discovery permitted by the district court, promptly conducting a deposition of Respondent Crawford. Crawford's deposition testimony raised additional concerns about the qualifications and training of the additional individuals the DOC retained to carry out the execution protocol. For example, Crawford testified that the implementation of the protocol could vary depending on the expertise of the individuals who happened to be available to participate in any given execution. Dkt. No. 71 at 1. In addition, though the DOC represented to the district court that its execution team included an anesthesiologist, Crawford revealed that the anesthesiologist is not under any obligation to participate in any execution; rather, according to Crawford, the anesthesiologist merely expressed the willingness to participate if he or she received "sufficient notice" and subject to his or her

availability. *Id.* at 1, 4. Based on this testimony, Petitioners filed a motion to seek further discovery, seeking *inter alia*, depositions of the additional execution team members, and documents relating to the training of these individuals. Dkt. No. 71.

On June 30, 2008, the district court issued an Order denying Respondents' motion for judgment on the pleadings, reaffirming its view that *Baze* did not foreclose Petitioners' claims. Dkt. No. 74. The district court correctly framed Petitioners' case as a challenge to the implementation of the execution protocol, noting that the allegations were "that the lethal chemicals may be improperly prepared or administered by unqualified and untrained personnel." *Id.* at 1. The district court recognized that "the allegations which the plaintiffs are raising in this case were not at issue and were not squarely addressed by the Supreme Court in *Baze*," and on that basis, concluded that "[t]here is nothing in the *Baze* opinion which prevents plaintiffs from bringing the instant action." *Id.* at 4.

One week later, several additional inmates moved to intervene in the district court action. First, on July 7, 2008, Petitioner John Middleton, then an inmate who had an execution date set for July 30, 2008, filed an emergency motion to intervene in the *Clemons* action. Dkt. No. 76. Shortly thereafter, Petitioners Earl Ringo, Jr. and Russell Bucklew – two additional inmates subject to pending motions for execution dates – likewise filed motions to intervene. Dkt. Nos. 78, 81. On July 11, 2008, the Missouri Supreme Court stayed Middleton's execution date, without further explanation, until

further order of the district court. Dkt. No. 86. Middleton and Bucklew notified the court of the stay of execution on July 14, 2008, and argued that the court should permit them to intervene in the *Clemons* action since it seemed unlikely the Missouri Supreme Court would set execution dates while *Clemons* proceeded. Dkt. Nos. 85, 86.

On July 15, 2008 – one day after publication of the Missouri Supreme Court's issuance of the stay, and with no prior notice to the parties – the district court *sua sponte* reconsidered its prior denial of Respondents' motion for judgment on the pleadings. Dkt. No. 89. Upon reconsideration, the district court granted the motion in its entirety, with no acknowledgement of its prior Order in which it recognized that *Baze* did not preclude Petitioners' claims. *Id.* Instead, the district court reversed course, holding that *Baze* and *Taylor* precluded Petitioners' claims, concluding that "[t]he law requires only a year of professional experience. The law does not allow plaintiffs input into who will be performing the executions, as long as they have the requisite experience and are licensed." *Id.* at 4.

E. Proceedings in the Eighth Circuit

On November 10, 2009, the Eighth Circuit affirmed the district court decision. Pet. App. 1a. In their appellate briefing, Petitioners argued that *Baze* did not preclude their challenge to the implementation of Missouri's written protocol. More specifically, Petitioners argued that the district court erred in holding that *Baze* precluded consideration of individual characteristics of execution personnel, and in holding that execution personnel would implement

the written protocol as intended. In addition, Petitioners argued that the district court erred in holding that *Baze* limited the scope of discovery that lethal injection plaintiffs are entitled to, and in denying plaintiffs discovery into the qualifications and training of execution personnel.

In affirming the district court, the Eighth Circuit "confine[d] itself to the question of whether Missouri's protocol violates the Eighth Amendment because of a possibility incompetent or unqualified personnel will improperly prepare or administer the lethal chemicals required by Missouri's protocol." Pet. App. 8a-9a. In answering this question, the Eighth Circuit stated that "[t]he Missouri protocol's safeguards against the risk of maladministration are similar to, and in many ways more stringent than, Kentucky's," *id.* at 12a, and despite the rich evidentiary record amassed during the *Taylor* litigation, "reject[ed] the prisoners' attempt to distinguish their case from *Baze* on the basis of alleged past incompetence on the part of Missouri's medical personnel." *Id.* at 13a-14a. The Eighth Circuit deemed irrelevant all evidence of past incompetence, including the DOC's employment of – and continued confidence in – Doe I. Rather, the Eighth Circuit dismissed Petitioners' numerous contentions concerning the DOC's past track record for hiring unqualified execution personnel while failing to provide adequate training, stating that "[t]he mere allegation Missouri employed an 'incompetent' and 'unqualified' individual in the past simply does not support the prisoners' allegations Missouri will employ 'incompetent' and 'unqualified'

personnel in the future." *Id.* at 15a. Accordingly, the Eighth Circuit held that "[i]n the absence of contrary supporting factual allegations, we will not assume or infer Missouri intends to disregard its own protocol, and this court's instructions, by employing medical personnel who are 'incompetent' or 'unqualified' to perform their assigned duties." *Id.* at 16a.

For these reasons, the Eighth Circuit concluded that judgment on the pleadings was proper. The court did not otherwise address the district court's specific discovery rulings. Petitioners sought rehearing and rehearing en banc. The Eighth Circuit of Appeals denied rehearing on December 22, 2009. Pet. App. 32a.

REASONS FOR GRANTING THE PETITION

I. The Eighth Circuit's Ruling That Petitioners Did Not Allege A Substantial Risk Of Serious Harm Is Erroneous And Conflicts With This Court's Decisions In *Iqbal* And *Twombly*, As Well As With *Baze*.

The decision of the Eighth Circuit flatly contravenes the precedents this Court has set out regarding the pleading of civil claims generally, and the prosecution of Eighth Amendment method-of-execution claims specifically. Petitioners filed a complaint containing detailed allegations of incompetence and malfeasance on the part of the DOC's execution personnel and administration during the immediately preceding executions carried out by Missouri. Petitioners alleged that the DOC's current personnel continued to suffer from

incompetence and a lack of proper training such that they posed a substantial risk of inflicting serious harm during executions. In holding that these allegations failed to state a claim, the Eighth Circuit effectively immunized the DOC's execution practices from all judicial scrutiny. If specific allegations of past and on-going incompetence are insufficient to get past the pleadings stage, then there is no allegation that is sufficient to state a claim. The consequence of the Eighth Circuit's decision is that Petitioners and future plaintiffs will be denied the opportunity to bring to light the types of dangerous execution practices that discovery has revealed in Missouri and elsewhere.

A. The Eighth Circuit's Decision Imposes A Heightened Pleading Standard That Conflicts With *Iqbal* And *Twombly*.

Federal Rule of Civil Procedure 8 requires the plaintiff to present a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). As the Court explained most recently in *Ashcroft v. Iqbal*, this standard "does not require 'detailed factual allegations'" but it does require the plaintiff to demonstrate that his allegations are "plausible," rather than merely "possible." 129 S. Ct. 1937, 1949 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

Petitioners' detailed complaint easily clears the Rule 8 plausibility standard. Petitioners' ultimate allegation is that Missouri is employing incompetent

personnel to carry out executions. But the complaint does not merely assert that conclusion; instead it provides a wealth of supporting allegations, frequently documented by discovery responses from the predecessor litigation.

Specifically, the complaint explains that in the immediate past, Missouri's previous execution team leader, Doe I, had "arbitrarily and secretly var[ied] the dose of thiopental from execution to execution," and "consistently prepared substantially less anesthetic" than Missouri's procedures called for. Pet. App. 46a. The problem was so serious that, to this day, the DOC is unsure precisely how little thiopental it administered. *Id.* at 47a-48a. The DOC knew that Doe I had "medical licensure problems and [a] problematic malpractice history," including that he had been barred from practicing at two Missouri hospitals, but gave him complete authority over the execution process nonetheless. *Id.* at 42a-43a. Indeed, the Department of Corrections continued to stand by Doe I, even when evidence of his malfeasance during executions had come to light. *Id.* at 49a-50a. For example, the head of the Department of Corrections testified that he believed Doe I to be a "bright" "professional" despite his manifest inability to carry out executions constitutionally. *Id.*

The complaint further alleges that when Doe I left the DOC, a few months prior to the filing of the complaint, the Department faced a "knowledge vacuum" because Doe I had previously had complete control and authority over execution procedures. *Id.* at 57a. Post-Doe I, the DOC was left "with no

execution personnel who have sufficient training and experience properly to implement the procedure." *Id.* at 56a. And "because sole responsibility for executions was vested in Doe I, the DOC's officials never developed the basic understanding of the lethal injection procedure and its risks." *Id.* at 57a. The head of the Department of Corrections had in fact stated that the DOC's primary goal was not to carry out humane executions, but rather to bring about the inmate's death with no observable suffering so as not to upset the public. *Id.* at 47a-48a.

Finally, the complaint details the shortcomings of the DOC's new written protocol concerning team member qualifications and training. For example, Petitioners alleged that the new written protocol "fail[ed] to provide any specific information concerning the qualifications or training required of the medical personnel whose services Defendants intend to use in the course of an execution." *Id.* at 50a-51a. Petitioners likewise asserted that the new written protocol failed to include "any requirement that the designated medical personnel will have training and qualifications sufficient to ensure that the condemned inmate reaches and maintains a surgical plane of anesthesia and have no other disqualifying characteristics." *Id.* at 51a. Petitioners alleged that despite the documented malfeasance of Doe I, the written protocol did not eliminate discretion afforded to execution personnel, *see, e.g.*, *id.* at 52a-53a, 60a-61a, and that the new protocol fails to protect against incompetent administration of the procedure. *Id.* at 51a, 59a-60a, 61a. Petitioners

further alleged that the "new protocol is purposefully written to be so vague as to lack meaningful information regarding the level of training and qualifications of the personnel who will perform [Petitioners'] executions." *Id.* at 59a-60a.

Based on all of this, Petitioners alleged that the DOC was not employing competent personnel to carry out executions, and those personnel therefore posed a substantial risk of inflicting serious harm. These allegations clear the plausibility bar necessary to survive the pleadings stage, as a court could "reasonably infer" from these allegations of misconduct and incompetence in the immediate past –including allegations pertaining to existing team members and DOC administrators – that those problems had not yet been sufficiently curbed.

The Eighth Circuit held that judgment on the pleadings was appropriate because it found the complaint's allegations to be merely conclusory. Pet. App. 14a-15a. The Eighth Circuit considered it implausible that the DOC would continue to employ incompetent personnel and fail to train them properly. In particular, the Eighth Circuit found that it was unreasonable to assume that the DOC would continue to have problems given that Doe I was no longer on the execution team. *Id.* at 15a.

The Eighth Circuit's reasoning does not withstand scrutiny. First, it ignores the wealth of allegations of *on-going* problems at the DOC. Missouri's problems were not limited to Doe I's own malfeasance. The reason Doe I was allowed to act improperly was that the DOC was unable or unwilling to gauge the competency of its execution personnel. It was the

DOC that employed Doe I despite knowing that he had been barred from two area hospitals. *See, e.g.*, *id.* at 47a-48a. And it was the DOC that continued to stand behind Doe I even after his malfeasance came to light. *Id.* at 49a-50a. Doe I's departure (and the record does not reveal whether he was fired or left on his own accord) does not mean that the DOC's oversight, retention, and training of execution personnel has improved. Indeed, the fact that the DOC sought execution dates before it had even hired and trained a post-Doe team shows that the DOC had not improved in this regard.

Second, the Eighth Circuit's view that it is implausible to allege a continuing violation from immediately prior bad acts of the same kind is itself untenable. Courts routinely treat past violations as plausibly suggesting that future violations may be forthcoming. *Cf.* 11A Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 2942 at 51 (2d ed. 1995) (explaining that injunction against future misconduct may be warranted despite "protestations of repentance and reform") (quoting *United States v. Oregon State Medical Society*, 343 U.S 326, 333 (1952) (quotation marks omitted). Indeed, in *Twombly* itself, this Court explained that the plaintiff's allegations of price-fixing fell short because "if history teaches anything," it was that the acts alleged were equally consistent with lawful behavior. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 567 (2007). Here, "if history teaches anything," it is that the DOC retains and tolerates incompetent personnel.

The reality is that the Eighth Circuit's decision insulates large swaths of DOC practices from judicial review. Any allegation about the deficient implementation of the protocol will necessarily be based on past DOC actions. If the DOC can obtain a dismissal at the pleadings stage simply by contending that past practices – no matter how recent and no matter ingrained – will no longer continue, Rule 8 will not serve as a check on implausible claims, but as a bar to all claims, plausible or not. To be sure, a bare allegation of misconduct is not sufficient to state a claim, but where, as here, the allegations of misconduct are numerous, detailed, and well-grounded, a plaintiff is entitled to proceed.

B. The Eight Circuit's Decision Conflicts With *Baze*.

The Eighth Circuit also justified its dismissal at the pleadings stage on the basis of this Court's decision in *Baze*. *Baze v. Rees*, 553 U.S. 35 (2008). But *Baze* does not support the result below; to the contrary, *Baze* makes clear that Petitioners' allegations do state a claim.

Baze affirmed the legal principle that procedures that pose a substantial risk of serious harm are forbidden by the Eighth Amendment. 553 U.S. at 50 (plurality opinion). And it further recognized that incompetent personnel could pose such a risk. *Id.* at 55 (noting that "most significant" safeguard in Kentucky protocol is that IV Team have at least one year of professional experience). That is precisely the legal claim that Petitioners raise here. To be sure, the *Baze* plurality found that the record in that

case revealed no basis for concluding that Kentucky's personnel were incompetent. But it reached that conclusion on the basis of a full trial record, rather than from a parsing of the pleadings alone.

In contrast, the Eighth Circuit proceeded from the premise that because it found Missouri's procedures to be similar to Kentucky's, Missouri's personnel also must not pose a substantial risk of serious harm. This is an obvious non-sequitur. *Baze* did not hold that execution personnel were categorically competent, such that any claim of incompetence should be dismissed at the pleadings stage. Such a rule would be nonsensical given that incompetent personnel are fully capable of deviating from prescribed procedures and creating grave risks. Missouri's own experience provides a prime example of this. Doe I deviated substantially from Missouri's chosen procedures when he arbitrarily reduced the amount of thiopental delivered to inmates.

The *Baze* decision in no way forecloses a challenge to the competence of the execution team and the ability to constitutionally carry out an execution. *Baze* sets out the standard that method-of-execution challenges must satisfy under the Eighth Amendment. Petitioners' complaint alleges a violation that states a claim under that standard. The Eighth Circuit was simply incorrect when it held that because a trial revealed no constitutional risk in Kentucky, it could conclude as a matter of law at the pleadings stage that no risk existed in Missouri as well.

II. There Is Considerable Confusion In The Lower Courts Regarding The Pleading Standards Applicable To Method-Of-Execution Claims.

In addition to being plainly incorrect, the Eighth Circuit's decision deepens the confusion of lower courts, post-*Baze*, concerning the type of allegations that are sufficient to state a claim in a method-of-execution challenge. For while most lethal injection challenges have been resolved on summary judgment or after a trial, there is a substantial split of authority among those courts that have considered the type of allegations necessary to state a claim or to satisfy an analogous standard.

On one side, the Fifth Circuit has adopted an approach that is consistent with the Eighth Circuit's. In *Raby v. Livingston*, the Fifth Circuit affirmed the dismissal of a lethal injection claim, finding that *Baze* barred the claims as a matter of law. -- F.3d -- --, No. 08-20772, 2010 WL 909097 (5th Cir. March 15, 2010). *Raby* was decided on summary judgment, but the circumstances of the case put it on all fours with this one. The plaintiffs in *Raby* had obtained minimal discovery before the district court stayed the case, pending the outcome of this Court's decision in *Baze*. *Id.* at *1. Immediately after the stay was lifted, defendants moved for summary judgment, while the plaintiff sought additional discovery pursuant to Federal Rule of Civil Procedure 56(f). *Id.* at *1-*2. The district court found that summary judgment was appropriate as a matter of law under *Baze*, and denied additional discovery. *Id.* at *2. On appeal, the Fifth Circuit affirmed, holding that the district court would have abused its discretion to

allow additional discovery because *Baze* barred method-of-execution challenges as a matter of law. *Id.* at *9 ("We read *Baze* to foreclose exactly the type of further litigation that Raby seeks to continue. The safe harbor established by *Baze* would hardly be safe if states following a substantially similar protocol nonetheless had to engage in prolonged litigation defending their method of lethal injection.").

In contrast, the Sixth Circuit has taken a far less strict view of when allegations challenging a method-of-execution may proceed in an analogous situation. For example, in *Reynolds v. Strickland*, 583 F.3d 956 (6th Cir. 2009), the Sixth Circuit granted a stay of execution to a prisoner who challenged "the competence of the lethal injection team" after Ohio had experienced difficulties placing IVs during several executions using procedures that were similar to those used in Kentucky. 583 F.3d at 957. Thus, for the Sixth Circuit, it was enough to show that Ohio had problems carrying out executions in the immediate past, just as Petitioners have alleged here. And given that the standard for obtaining a stay is more stringent than the standard for stating a claim in that the former requires a likelihood of success while the latter requires only that success be plausible, *Reynolds*'s analysis conflicts with the reasoning the Eighth Circuit employed here.

Likewise, in *Jones v. Bradshaw*, the Sixth Circuit considered whether a plaintiff could proceed with a federal habeas claim challenging Ohio's method of execution. No. 07-3766, Slip Op. (6th Cir. July 23, 2008). The district court, in a ruling issued prior to *Baze*, held that the habeas claim had to be dismissed

because Ohio's three-drug protocol was the same as those used by the majority of other states, and was thus per se constitutional. *Jones v. Bradshaw*, 489 F. Supp. 2d 786, 844 (N.D. Ohio 2007). Post-*Baze*, the Sixth Circuit granted a certificate of appealability on the lethal injection claim, and ultimately remanded the claim to the district court for "limited discovery" and an evidentiary hearing. *Jones v. Bradshaw*, No. 07-3766, Order (6th Cir. Jan. 30, 2009). In doing so, it found that *Baze* established that the relevant question was whether a protocol posed a substantial risk of serious harm, and it held that question could be answered only through the development of a factual record.

In addition, several federal district courts have held that allegations less detailed than Petitioners' were sufficiently plausible to state a claim under *Baze*. For example, in *Chester v. Beard*, 657 F. Supp. 2d 534 (M.D. Pa. 2009), the plaintiffs alleged, *inter alia*, that they faced a substantial risk of serious injury from the fact "that the personnel charged with administering Pennsylvania's death-penalty protocol are insufficiently trained, and that the Commonwealth has put in place inadequate safeguards to ensure that condemned inmates do not suffer extreme pain and suffering during their executions. . . ." *Id.* at 544-45. The State filed a motion to dismiss contending that the plaintiffs' allegations were legally insufficient under *Baze*. *Id.* at 542. The district court denied the motion. In reasoning contrary to that of the Eighth Circuit's, the court held that the plaintiffs' allegations, if true, would demonstrate a substantial risk of serious

harm within the meaning of *Baze*. It then held that the plaintiffs were entitled to prove their claims "notwithstanding the outcome in *Baze*" because *Baze*'s refusal to invalidate the Kentucky protocol "relied upon the substantial factual findings that were developed in the Kentucky state courts." *Id.* at 544. Because *Baze*'s "narrow[]" holding was not dispositive of plaintiffs' claims at the pleading stage, the court denied the motion to dismiss. *Id.* at 542, 545.

Likewise, in *Thorson v. Epps*, the district court denied Mississippi's motion to dismiss where the plaintiffs had alleged that the state's executioners were inadequately trained. 4:08-CV-129-WAP, 2009 WL 1766806 (N.D. Miss. June 22, 2009). The court rejected the state's argument that *Baze* foreclosed the claims, noting that *Baze* "was decided only after the factual record was completely developed." *Id.* at *1. The court then held that the plaintiff's allegations of executioner incompetence, if taken as true, "plausibly would entitle him to relief." Similarly, other courts also found that a plaintiff plausibly alleged that lethal injection protocols violated the Eighth Amendment. *See also Taylor v. Jones*, No. 05-CIV-0825-F, Slip Op. at 2 (W.D. Okla. Dec. 5, 2008) (Docket No. 139) (denying motion to dismiss post-*Baze* because complaint alleged substantial risk of serious harm and an "evidentiary record would be helpful" to assess validity of claims).[5]

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[5] While these cases were decided by district courts, they should be treated as having contributed to a material split of authority because the denial of a motion to dismiss is not final,

The Eighth Circuit's decision below is diametrically opposed to the reasoning in these cases. The Eighth Circuit found that Petitioners had failed to state a plausible claim even in light of their detailed allegations of immediate past misconduct and flawed institutional oversight by the DOC. Conversely, in the cases described above, the plaintiffs were allowed to move past the pleadings stage on the basis of more general allegations of executioner incompetence.

III. Either Summary Reversal Or Plenary Consideration Of The Decision Below Is Appropriate.

As we have explained, the Eighth Circuit's decision is erroneous under this Court's Rule 8 jurisprudence and its Eighth Amendment jurisprudence. This is not a case in which the allegations in question are on the borderline of the Rule 8 plausibility threshold. Thus, because the Court of Appeals' error is clear, this case is appropriate for summary reversal and remand for continuing proceedings, including discovery as the district court sees fit in its discretion to allow.

Alternatively, Petitioners ask that this Court set the case for plenary consideration on the merits so as to give the lower courts greater guidance as to what type of allegations state a claim under *Baze*.

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and generally not appealable. As a result, the courts of appeals have limited opportunities to address the correctness of a district court's decision to allow a case to proceed in the face of a motion to dismiss.

CONCLUSION

The petition for a writ of certiorari should be granted.

April 21, 2010

Respectfully submitted,

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Appendix A

United States Court of Appeals
for the Eighth Circuit

Nos. 08-2807/08-2813/08-2894/08-2895

Reginald Clemons; Richard D. Clay; Jeffrey R. Ferguson; Roderick Nunley,
Plaintiffs,

Michael Anthony Taylor; Martin Link; Mark Christeson; William L. Rousan; John Charles Middleton; Russell Earl Bucklew; Earl Ringo, Jr.,
Intervenor Plaintiffs/Appellants,

v.

Larry Crawford; James D. Purkett; Terry Moore,
Defendants/Appellees.

Appeals from the United States District Court for the Western District of Missouri.

Submitted: February 11, 2009
Filed: November 10, 2009

Before RILEY, SMITH, and SHEPHERD, Circuit Judges.

RILEY, Circuit Judge:

Eight condemned Missouri prisoners[1] appeal the dismissal of their 42 U.S.C. § 1983 action challenging the manner in which Missouri's written lethal injection protocol might be implemented in future executions. The prisoners allege the State of Missouri, through its officers Larry Crawford, James Purkett, and Terry Moore (collectively, Missouri), has a "well-documented history of employing incompetent and unqualified personnel to oversee [the] crucial element[s] of executions by lethal injection," and "refusing properly to train the individuals to whom responsibility for crucial tasks in the lethal injection process is delegated." Based on this history, the prisoners argue Missouri "will continue to employ such incompetent and unfit personnel for future executions." The prisoners contend this possibility violates the Eighth Amendment by creating a substantial risk that Missouri's written execution protocol will not be followed, resulting in the condemned prisoners being insufficiently anesthetized and suffering extreme pain before their deaths.

The district court[2] initially denied Missouri's motion for judgment on the pleadings, but later reconsidered *sua sponte* and granted the motion. In the same

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[1] These eight prisoners, Reginald Clemons, Richard D. Clay, Jeffrey R. Ferguson, Roderick Nunley, Michael Anthony Taylor, Martin Link, Mark Christeson, and William L. Rousan, will be collectively referred to as the "prisoners."

[2] The Honorable Fernando J. Gaitan, Chief Judge, United States District Court for the Western District of Missouri.

order, the district court denied the motions to intervene of three other condemned Missouri prisoners.[3] The intervenors appeal this ruling. We affirm the district court's grant of judgment on the pleadings and its denial of the motions to intervene.

I. BACKGROUND

A. Missouri's Execution Procedure Before the Written Protocol

Before establishing a written execution protocol, Missouri used an unwritten execution procedure which called for the successive administration of three chemicals through an intravenous line (IV) placed in the femoral vein. *See Taylor v. Crawford*, 487 F.3d 1072, 1074 (8th Cir. 2007), *cert. denied*, 128 S. Ct. 2047 (2008). First, 5 grams of sodium pentothal (also known as thiopental) rendered the prisoner unconscious, then 60 milligrams of pancuronium bromide paralyzed the prisoner's muscles, and finally, a 240-milliequivalent injection of potassium chloride stopped the prisoner's heart. *Id.*

Discovery in the *Taylor* litigation[4] revealed Missouri employed a physician, John Doe I (Dr. Doe), to mix

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[3] These three prisoners, John Charles Middleton, Russell Earl Bucklew, and Earl Ringo, Jr., will be collectively referred to as the "intervenors."

[4] The full history of the *Taylor* litigation is recounted in *Taylor*, 487 F.3d 1072, *Taylor v. Crawford*, 445 F.3d 1095, 1096-98 (8th Cir. 2006), and *Taylor v. Crawford*, 457 F.3d 902, 904 (8th Cir. 2006).

the lethal chemicals and insert the IV lines. *Id.* at 1075. Under Missouri's unwritten procedure, Dr. Doe believed he had "independent authority to alter the chemical doses at will based on his medical judgment, and that in fact, there were occasions when he chose to give a dose of only 2.5 grams of thiopental without notifying the director."[5] *Id.* "Dr. Doe [ ] revealed that he has dyslexia, which causes him to transpose letters and numbers," *id.*, and Dr. Doe also "admitted he did not keep accurate chemical logs" documenting the amount of each chemical given at an execution, *id.* at 1076. Dr. Doe monitored the prisoner's anesthetic depth solely by observing the prisoner's facial expression through a window which was partially obstructed by blinds. *Id.* at 1075. The prisoners' complaint in the instant case asserts Missouri knew Dr. Doe had "medical licensure problems and problematic malpractice history."[6] The prisoners also assert a licensed vocational nurse, John Doe II (Nurse Doe),"was unable to tell, despite personal observation, that [Dr. Doe] consistently prepared the wrong dose of thiopental."

During the *Taylor* litigation, the district court determined Missouri's unwritten method of execution

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[5] A dose of 2.5 grams of thiopental would be sufficient to induce a state of deep anesthesia, and, "in fact, rapid induction of anesthesia for surgery is generally achieved in the average adult with a 0.28-gram dose." *Taylor*, 487 F.3d at 1076.

[6] Despite Dr. Doe's shortcomings, we observed "there was not a scintilla of evidence that any prisoner ever suffered any pain other than what was necessary to acquire access to the prisoner's circulatory system through the insertion of the needed intravenous lines." *Taylor*, 487 F.3d at 1075.

subjected condemned prisoners to an unconstitutional risk of pain and suffering, and ordered the State to prepare a written protocol incorporating various provisions. *See Taylor v. Crawford*, No. 05-4173-CV-C-FJG, 2006 WL 1779035, *8 (W.D. Mo. June 26, 2006). Missouri established a written execution protocol and, after further litigation, this court upheld the constitutionality of Missouri's written protocol. *See Taylor*, 487 F.3d at 1085.

B. Missouri's Written Lethal Injection Protocol

Missouri's written execution protocol requires the successive administration of the same three chemicals used under the unwritten protocol. First, a set of four syringes containing a total of 5 grams of thiopental in a 200 cc solution renders the prisoner unconscious, and is followed by a saline flush. Medical personnel then "physically examine the prisoner to confirm that he is unconscious," using "standard clinical techniques to assess consciousness, such as checking for movement, opened eyes, eyelash reflex, pupillary responses or diameters, and response to verbal commands and physical stimuli." Medical personnel then inspect the IV site. A second set of syringes containing an additional 5 grams of thiopental will be administered through a secondary IV line in the unlikely event the prisoner is still conscious after receiving the initial 5 grams. After confirming the prisoner is unconscious, 60 milligrams of pancuronium bromide in a 60 cc solution is injected, rendering the prisoner unable to

move. The prisoner is then injected with another saline flush. Finally, 240 milliequivalents of potassium chloride is injected to stop the prisoner's heart. After another saline flush, medical personnel monitor the electrical activity of the prisoner's heart, pronouncing death when an electrocardiogram shows all electrical activity of the prisoner's heart has ceased. If the prisoner's heart does not stop within five minutes, additional potassium chloride is injected. The proper administration of thiopental ensures the condemned prisoner will not experience any pain caused by the "potassium chloride, which indisputably will cause an excruciating burning sensation as it travels through [the condemned prisoner's] veins to induce a heart attack." *Taylor*, 487 F.3d at 1074.

The execution team includes medical personnel and non-medical personnel. Under the protocol, a physician, nurse, or pharmacist prepares the chemicals used at the execution. Medical personnel may not change the quantities of these chemicals without prior approval from the department director. The fifteen syringes are distinctively labeled. "Medical personnel determine the most appropriate locations for [IV] lines," and "may insert the primary IV line as a peripheral line or as a central venous line . . . provided they have appropriate training, education, and experience for that procedure." A physician, nurse, or emergency medical technician (EMT) is responsible for inserting the IV lines, inspecting the IV site, attaching the leads from the electrocardiograph to the prisoner's chest, assessing

the prisoner's consciousness, monitoring the prisoner, and supervising the injection of the lethal chemicals by non-medical members of the execution team. After the execution, medical personnel are required to sign a "Chemical Log," indicating the quantities of the chemicals used and the quantities discarded during the execution. Missouri's protocol also requires all members of the execution team to sign a form verifying the chemicals were given in the order specified by the protocol. Dr. Doe is no longer a member of Missouri's execution team. *Taylor*, 487 F.3d at 1077 n.3.

II. DISCUSSION

A. Standard of Review

We review de novo a district court's grant of judgment on the pleadings, "view[ing] all facts pleaded by the nonmoving party as true and grant[ing] all reasonable inferences in favor of that party." *Poehl v. Countrywide Home Loans, Inc.*, 528 F.3d 1093, 1096 (8th Cir. 2008) (citations omitted). "A grant of judgment on the pleadings is appropriate 'where no material issue of fact remains to be resolved and the movant is entitled to judgment as a matter of law.'" *Id.* (quoting *Faibisch v. Univ. of Minn.*, 304 F.3d 797, 803 (8th Cir. 2002)).

We review the grant of judgment on the pleadings under "the same standard used to address a motion to dismiss for failure to state a claim under [Fed. R. Civ. P.] 12(b)(6)." *Ashley County, Ark. v. Pfizer, Inc.*, 552 F.3d 659, 665 (8th Cir. 2009) (citation omitted).

"[W]ell-pleaded facts, not legal theories or conclusions, determine [the] adequacy of [t]he complaint." *Mattes v. ABC Plastics, Inc.*, 323 F.3d 695, 698 (8th Cir. 2003) (citing *Parkhill v. Minn. Mut. Life Ins. Co.*, 286 F.3d 1051, 1057-58 (8th Cir. 2002)). The facts alleged in the complaint "'must be enough to raise a right to relief above the speculative level.'" *Drobnak v. Andersen Corp.*, 561 F.3d 778, 783 (8th Cir. 2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

B. Eighth Amendment

The prisoners argue Missouri's current execution protocol violates the Eighth Amendment because of the substantial risk the protocol may be improperly administered by incompetent or unqualified medical personnel. According to the prisoners' allegations, Missouri's past employment of Dr. Doe and Nurse Doe creates "a grave risk that [the prisoners] will experience unconstitutional pain and suffering" during their future executions, in violation of their Eighth and Fourteenth Amendment rights. Put another way, the prisoners argue Missouri will hire "incompetent and unfit personnel" in the future because it has allegedly done so in the past. The prisoners assert, although Missouri's written protocol is constitutional on its face, the written protocol "will have little effect when ignored or bungled by incompetent or unfit personnel." Because we have already held Missouri's execution protocol is constitutional as written, our opinion now confines itself to the question of whether Missouri's protocol violates the Eighth Amendment because of a

possibility incompetent or unqualified personnel will improperly prepare or administer the lethal chemicals required by Missouri's protocol.

"The Eighth Amendment to the Constitution, applicable to the States through the Due Process Clause of the Fourteenth Amendment, provides that '[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.'" *Baze v. Rees*, 553 U.S. ___, 128 S. Ct. 1520, 1529 (2008) (internal citation omitted). Because capital punishment is constitutional, "[i]t necessarily follows that there must be a means of carrying it out." *Id.* "[T]he constitution does not demand the avoidance of all risk of pain in carrying out executions." *Id.* Instead, to establish an Eighth Amendment violation, "the conditions presenting the risk must be `*sure or very likely* to cause serious illness and needless suffering,' and give rise to 'sufficiently *imminent* dangers.' *Id.* at 1530-31 (quoting *Helling v. McKinney*, 509 U.S. 25, 33, 34 (1993)). "[T]o prevail on such a claim there must be a 'substantial risk of serious harm,' an `objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" *Id.* at 1531 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842, and 846 n.9 (1994)). The mere fact "an execution method may result in pain, either by accident or as an inescapable consequence of death," does not amount to an Eighth Amendment violation. *Id.*

In *Baze*, the Supreme Court addressed the constitutionality of Kentucky's written lethal

injection protocol. *Id.* at 1525-26. Like Missouri's protocol, Kentucky's protocol involves the successive administration of thiopental, pancuronium bromide, and potassium chloride. *Id.* at 1528. Kentucky's "protocol reserves responsibility for inserting the IV catheters to qualified personnel having at least one year of professional experience." *Id.* Non-medical "personnel are responsible for mixing the solutions containing the three drugs and loading them into syringes." *Id.* The warden and deputy warden are responsible for visually inspecting the prisoner for signs of consciousness and watching for problems with the IV catheters and tubing. *Id.*

Like the prisoners in this case, the *Baze* petitioners contended there was "a significant risk that the [lethal injection] procedures [would] *not* be properly followed—in particular, that the sodium thiopental [would] not be properly administered to achieve its intended effect—resulting in severe pain when the other chemicals are administered." *Id.* at 1530. With respect to the risk the thiopental would be improperly prepared, the *Baze* petitioners contended (1) "the doses are difficult to mix into solution form and load into syringes," and (2) "Kentucky employs untrained personnel who are unqualified to calculate and mix an adequate dose[.]" *Id.* at 1533. The Supreme Court saw no substantial risk of serious harm in allowing non-medical personnel to mix the thiopental, recognizing the state trial court's finding that mixing thiopental is a simple process involving injecting a liquid into a vial of powder and shaking it up until the powder dissolves. *See id.*

The *Baze* petitioners also made similar arguments regarding the risk the thiopental would be improperly administered. The *Baze* petitioners argued it was "possible that the IV catheters [would] infiltrate into surrounding tissue, causing an inadequate dose to be delivered to the vein," and "Kentucky has no reliable means of monitoring the anesthetic depth of the prisoner after the sodium thiopental has been administered." *Id.* The Court rejected these arguments, declaring, "the asserted problems related to the IV lines do not establish a sufficiently substantial risk of harm to meet the requirements of the Eighth Amendment." *Id.*

The Court determined there was no substantial risk of serious harm because Kentucky's protocol incorporated various important safeguards to protect against improper administration of thiopental, "[t]he most significant [safeguard being] the written protocol's requirement that members of the IV team must have at least one year of professional experience as a certified medical assistant, phlebotomist, EMT, paramedic, or military corpsman." *Id.* The Court also observed Kentucky's protocol required preparation of two sets of lethal injection drugs, and "call[ed] for the IV team to establish both primary and backup lines." *Id.* at 1534. The Court reasoned, "These redundant measures ensure that if an insufficient dose of sodium thiopental is initially administered through the primary line, an additional dose can be given through the backup line before the last two drugs are injected." *Id.* Finally, the Court recognized the

additional safeguard of "the warden and deputy warden in the execution chamber ... watch[ing] for signs of IV problems, including infiltration," which "would be very obvious even to the average person, because of the swelling that would result." *Id.* (internal quotation marks omitted). The Court held, "[t]he risks of maladministration [petitioners] have suggested—such as improper mixing of chemicals and improper setting of IVs by trained and experienced personnel—cannot remotely be characterized as 'objectively intolerable.' *Id.* at 1537. Addressing future challenges to other states' protocols, the Court declared, "[a] State with a lethal injection protocol substantially similar to [Kentucky's] ... would not create" a substantial risk of severe pain rising to the level of an Eighth Amendment violation. *Id.*

The Missouri protocol's safeguards against the risk of maladministration are similar to, and in many ways more stringent than, Kentucky's. Missouri's protocol requires a physician, nurse, or pharmacist (rather than a layperson) to prepare the thiopental. Missouri also requires medical personnel (rather than the warden or deputy warden) to watch for signs of IV problems, and to enter the execution chamber to check for signs of consciousness and examine the IV site. A physician, nurse, or EMT with appropriate training, education, and experience sets the IVs. A backup IV is set, and an additional 5 grams of thiopental is prepared in the unlikely event the prisoner is still conscious after receiving the first 5-gram dose. Medical personnel have no discretion to

vary the amount of chemicals given without prior approval from the director. As we recognized in *Taylor*, the various safeguards in Missouri's protocol, coupled with the lack of discretion allowed, minimize any risk that the chemicals will be improperly prepared or administered. *See Taylor*, 487 F.3d at 1084.

The prisoners contend their allegations are different from the allegations in *Baze*, because *Baze* addressed only the risk that *competent* medical personnel might improperly prepare or administer the lethal chemicals. The prisoners in this case emphasize that their allegations state a claim for violation of the Eighth Amendment because they have alleged previous improper preparation and administration of the lethal chemicals by *incompetent* medical personnel.[7] The Missouri prisoners here, just as the Kentucky petitioners in *Baze*, "acknowledge that the lethal injection procedure, if applied as intended, will result in a humane death," but "nevertheless contend that the lethal injection protocol is unconstitutional ..., because of the risk that the protocol's terms might not be properly followed . . . ." *Baze*, 128 S. Ct. at 1526. We reject the prisoners' attempt to distinguish their case from *Baze* on the basis of alleged past

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[7] Because the prisoners do not define the terms "competent" or "incompetent," we give the words their dictionary definitions. "Competent" is defined as "having suitable or sufficient skill, knowledge, experience, etc., for some purpose; properly qualified." *Random House Webster's Unabridged Dictionary*, 417 (2d ed. 1997). "Incompetent" is defined as "not competent; lacking qualification or ability; incapable." *Id.* at 967.

incompetence on the part of Missouri's medical personnel.

In *Taylor*, we declared, "[a]bsent some specific disqualifying characteristic of the chosen medical personnel, we would be hard pressed to say that a physician, trained nurse, or a licensed pharmacist is not qualified to mix the chemicals." *Taylor*, 487 F.3d at 1084. The prisoners' complaint sets forth no such disqualifying characteristic.[8] Further, although the prisoners' complaint repeatedly uses conclusory terms such as "incompetent," "unfit," "untrained," and "unqualified," the prisoners set forth absolutely no factual allegations suggesting incompetence, lack of necessary qualifications, or inadequate training on

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[8] In their brief, the prisoners allege discovery revealed a member of the execution team, possibly Nurse Doe, has a 1998 misdemeanor criminal conviction for aggravated stalking. The basis for the prisoners' contention is a newspaper article reporting a nurse on the execution team pleaded no contest to misdemeanor counts of stalking and tampering with property, arising from charges the nurse vandalized property and threatened a man who was having an affair with the nurse's estranged wife. The article also describes the nurse as having an "unblemished" nursing license. Because the prisoners' complaint does not include these allegations, we do not consider them on appeal. However, even if the prisoners had amended their complaint to include these allegations, we fail to see the relationship between the nurse's misdemeanor conviction and the nurse's competence to mix chemicals, check a prisoner for signs of consciousness, insert an IV, or monitor an IV site. *See Harbison v. Little*, 571 F.3d 531, 537 (6th Cir. 2009) (rejecting the district court's determination that a Tennessee execution team member's "history of drug and alcohol addiction and psychological disorders . . . raised questions about the screening process for members of the execution team").

the part of any current or prospective member of Missouri's execution team. The prisoners' complaint makes no factual allegations suggesting any current or prospective member of Missouri's execution team would intentionally or unintentionally deviate from or ignore the written protocol. Nothing in the prisoners' complaint even remotely suggests any action or inaction by any member of Missouri's execution team poses a substantial risk of serious harm.

Instead, the prisoners' allegations stem entirely from Missouri's previous employment of Dr. Doe and, to a much lesser extent, Nurse Doe. Dr. Doe operated under an unwritten procedure, which Dr. Doe believed conferred upon him "independent authority to alter the chemical doses at will based on his medical judgment." *Id.* at 1075. It is undisputed that former unwritten protocol is no longer in effect and Dr. Doe no longer participates in executions in Missouri. Even accepting the prisoners' assertion Dr. Doe can be characterized as "incompetent" and "unqualified," Dr. Doe's past "incompetence" and lack of qualifications, while operating under the former unwritten protocol, does not support an inference any member of Missouri's current execution team is "incompetent" or "unqualified." The mere allegation Missouri employed an "incompetent" and "unqualified" individual in the past simply does not support the prisoners' allegations Missouri will employ "incompetent" and "unqualified" personnel in the future.

Missouri's new protocol specifically requires a physician, nurse, or pharmacist to prepare the chemicals used at the execution, and requires a physician, nurse, or EMT to carry out the remaining medical aspects of the execution and supervise the non-medical members of the execution team. In *Taylor*, we emphasized "it is imperative for the State to employ personnel who are properly trained to competently carry out each medical step of the procedure." *Taylor*, 487 F.3d at 1084. In the absence of contrary supporting factual allegations, we will not assume or infer Missouri intends to disregard its own protocol, and this court's instructions, by employing medical personnel who are "incompetent" or "unqualified" to perform their assigned duties. The prisoners have not alleged a sufficiently substantial risk of serious harm or a sufficiently imminent danger to support an Eighth Amendment claim. We therefore conclude the district court did not err by determining, as a matter of law, the prisoners failed to state a claim for violation of the Eighth Amendment.

C. Discovery

The prisoners argue the district court erroneously determined *Baze* limits the scope of discovery to which condemned prisoners are entitled, and precludes any consideration of the backgrounds or characteristics of individual members of Missouri's execution team as a matter of law. This is a misreading of the district court's order. The district court did not find that, under *Baze*, no facts could ever exist to warrant discovery into the background

of a specific member of Missouri's execution team, or that consideration of a specific team member's background or characteristics is precluded in every case as a matter of law, nor do we read *Baze* so broadly. The district court simply determined judgment on the pleadings was appropriate in this case, and therefore the prisoners were not entitled to further discovery. Because we affirm the district court's grant of judgment on the pleadings, we need not address the specific discovery rulings the district court made before granting judgment on the pleadings. *See Casazza v. Kiser*, 313 F.3d 414, 420 (8th Cir. 2002) (recognizing an appellate court need not reach discovery issues when affirming a district court's grant of a motion to dismiss).

The prisoners protest that, because the identities of the execution team members are kept secret, the prisoners are unable to uncover facts relating to the backgrounds and characteristics of individual execution personnel without first engaging in discovery. In their complaint, the prisoners assert they "are entitled by due process of law to receive information regarding the qualifications, training[,] and fitness of execution team members," and Missouri's "refusal to provide Plaintiffs with sufficient information bearing on the training and qualifications of the personnel . . . constitutes a violation of Plaintiffs' rights to due process of law." At oral argument the prisoners expressly abandoned this due process claim on appeal. Therefore, we need not decide whether the prisoners have a due process right

to discover information relating to their executioners' backgrounds and qualifications.[9]

D. Motions to Intervene

The intervenors contend the district court erroneously denied their motions to intervene because (1) they are entitled to intervene in the action as of right, and (2) alternatively, they meet the requirements for permissive intervention. Because the district court properly granted judgment on the pleadings, we need not decide whether the intervenors should have been allowed to intervene if the underlying case had survived judgment on the pleadings. The district court did not err by denying the prisoners' motions to intervene because there is no longer an underlying case in which to intervene. *See Webster Groves Sch. Dist. v. Pulitzer Publ'g. Co.*, 898 F.2d 1371, 1377 (8th Cir. 1990) (finding no abuse of discretion in the district court's denial of a motion for permissive intervention where "the [plaintiff] already had taken a voluntary dismissal of its suit, and there remained no case in which to intervene"); see *also Shempert v. Harwick Chem. Corp.*, 151 F.3d 793, 799 (8th Cir. 1998) (concluding the district court's denial of a motion to intervene was proper where the main action was dismissed).

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[9] However, we have located no authority indicating the prisoners have such a due process right to probe into the backgrounds of execution personnel.

III. CONCLUSION

We affirm the district court's grant of judgment on the pleadings and its denial of the motions to intervene.

Appendix B

In the United States District Court
for the Western District of Missouri
Central Division

Reginald CLEMONS,
Richard D. CLAY, Jeffrey
FERGUSON, and
Roderick NUNLEY,
Plaintiffs,

v. Case No. 07-4129-CV-C-FJG

Larry CRAWFORD,
James D. PURKETT,
Terry MOORE, and John
DOES 1-50,
Defendants.

ORDER

On June 30, 2008, the Court denied defendants' Motion for Judgment on the Pleadings. However, upon further reflection of the decisions in *Baze* and *Taylor*, the Court reconsiders its decision and hereby **GRANTS** defendants' Motion for Judgment on the Pleadings.

> When considering a motion for a judgment on the pleadings, the Court accepts as true all facts pleaded by the

> nonmoving party and grants all reasonable inferences from the pleadings in favor of the nonmovant... . Judgment on the pleadings is appropriate where no material issue of fact remains to be resolved and the movant is entitled to judgment as a matter of law.

Osby v. Citigroup, Inc., No. 07-CV-06085-NKL, 2008 WL 2074102, *1 (W.D.Mo. May 14, 2008)(internal citations and quotations omitted).

In their Complaint, plaintiffs allege that "[d]efendants have demonstrated a failure to employ qualified and trained personnel to discharge the medical tasks associated with the lethal injection procedure." (Complaint, ¶ 70). Plaintiffs further allege that based on defendants' past failure to select trained and qualified personnel, there is a substantial likelihood that the personnel defendants will select to implement the revised procedure will also be unfit. This failure to select untrained personnel will result in a grave risk that plaintiffs will experience unconstitutional pain and suffering in the course of their executions. (Complaint, ¶¶ 71-73).

Since plaintiffs' Complaint was filed on July 9, 2007, the Supreme Court handed down its decision in *Baze v. Rees*, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008) Although the Supreme Court did not go int great detail regarding the qualifications of the members of Kentucky's

execution team, the Supreme Court did offer some guidance. The Supreme Court noted in its opinion that the members of the Kentucky team all had at least one year of professional experience as a certified medical assistant, phlebotomist, EMT, paramedic or military corpsman. Additionally, the Court noted that each member of that team participated in at least ten practice sessions per year. Id. at 1533-34. The Supreme Court stated:

> [a] stay of execution may not be granted on grounds such as those asserted here unless the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain. He must show that the risk is substantial when compared to the known and available alternatives. A State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard.

Id. at 1537.

In *Taylor v. Crawford*, 487 F.3d 1072 (8th Cir. 2007), *cert. denied*, 128 S.Ct. 2047 (2008), the Eighth Circuit noted that Missouri's revised protocol calls for a physician, nurse or pharmacist to prepare the chemicals. The quantities of the chemicals may not be changed without prior approval of the department director. A physician, nurse or

emergency medical technician is responsible for inserting the intravenous lines and confirming that the IV lines are working properly. Additionally, both a primary and a backup IV are set in place. After the five grams of thiopental are injected, the medical personnel physically examine the prisoner to confirm unconsciousness. After confirming unconsciousness, the second and third chemicals are injected, if at least three minutes have passed since the thiopental was injected. Also, the Department recently indicated that an anesthesiologist with more than one year of professional experience has also been added to the execution team. Thus, the protocol now actually exceeds what the *Taylor* court found constitutional.

Plaintiffs argue that the State has historically employed execution personnel who have been unable to perform many of the critical tasks required to carry out an execution humanely. Plaintiffs state that the Department of Corrections has failed and will continue to fail to adequately train and support these personnel in the performance of the execution procedure and that these failures are likely to lead to the maladministration of the execution procedure because the protocol leaves to the discretion of the execution team how several of the steps of the procedure will be carried out.

The Court disagrees. The protocol which is currently in place leaves very little discretion to the members of the execution team. Although there is some discretion, that is to be expected, because every inmate and execution are different. However, the

main components of the procedure are established and the members of the execution team are not allowed to significantly vary any of the major steps in the protocol without proper authorization.

Additionally, the members of the execution team are fully qualified to carry out the steps of the execution protocol. Plaintiffs wish to more extensively probe into the backgrounds of the team members and to question them regarding how they will carry out their duties. However, the law does not allow plaintiffs to select the most qualified medical personnel to serve on the execution team. The law requires only a year of professional experience. The law does not allow plaintiffs input into who will be performing the executions, as long as they have the requisite experience and are licensed in their field. As the Eighth Circuit stated in *Taylor*:

> The state has broad discretion to determine the procedures for conducting an execution . . .[W]e recognize that what could be done to update or even improve the protocol is not the appropriate legal inquiry to be undertaken by this or any other reviewing court. . . . Where the procedures are reasonably calculated to ensure a swift, painless death, they are immune from constitutional attack, . . . as the Constitution protects only against the wanton and unnecessary infliction of pain. What the Sixth Circuit said about the Tennessee

> protocol is equally true about Missouri's: The whole point of the [Missouri] lethal injection protocol is to avoid the needless infliction of pain, not to cause it. . . . The State's written protocol does not present any substantial foreseeable risk that the inmate will suffer the unnecessary or wanton infliction of pain.

Id. at 1084-85 (internal citations and quotations omitted).

After further reflection and analysis of the decisions in Baze and *Taylor*, the Court finds that there are no material issues of fact which remain to be resolved. The revised protocol which the Department of Corrections has now adopted is constitutional on its face as judged by the standards established by the Supreme Court.

Accordingly, the Court hereby **GRANTS** defendants' Motion for Judgment on the Pleadings (Doc. # 47); **DENIES** plaintiffs' Motion for Further Discovery (Doc. # 70); **DENIES** the Motions to Intervene filed by John Middleton, Russell Bucklew and Earl Ringo, Jr. (Docs. # 76, 78 and 81), **GRANTS** defendants' Motion to Replace Exhibit G, attached to Document No. 83 (Doc. # 84), **GRANTS** the Motion to File a File-Stamped Copy of Motion for Stay of Execution (Doc. # 86) and **DENIES** defendants' Motion for Expedited Ruling with Regard to John Middleton's Motion to Intervene (Doc. # 87).

Date: 7/15/08
Kansas City, Missouri

S/ FERNANDO J. GAITAN, JR.
Fernando J. Gaitan, Jr.
Chief United States District Judge

Appendix C

In the United States District Court
for the Western District of Missouri
Central Division

Reginald CLEMONS,
Richard D. CLAY, Jeffrey
FERGUSON, and
Roderick NUNLEY,
Plaintiffs, Case No. 07-4129-CV-C-FJG

v.

Larry CRAWFORD,
James D. PURKETT,
Terry MOORE, and John
DOES 1-50,
Defendants.

ORDER

Currently pending before the Court is defendants' Motion for Judgment on the Pleadings (Doc. # 47).

I. BACKGROUND

Plaintiffs are prisoners with death sentences who claim that Missouri's implementation of its method of execution is unconstitutional because of the risk that the lethal chemicals may be improperly prepared or administered by unqualified and untrained personnel. Plaintiffs also claim a due

process violation because they were not provided with adequate information so that an assessment of the qualifications of the execution personnel can be made.

II. STANDARD

> When considering a motion for a judgment on the pleadings, the Court accepts as true all facts pleaded by the nonmoving party and grants all reasonable inferences from the pleadings in favor of the nonmovant. . . . Judgment on the pleadings is appropriate where no material issue of fact remains to be resolved and the movant is entitled to judgment as a matter of law.

Osby v. Citigroup, Inc., No. 07-CV-06085-NKL, 2008 WL 2074102, *1 (W.D. Mo. May 14, 2008)(internal citations and quotations omitted).

III. DISCUSSION

Defendants argue that Missouri's Lethal Injection Protocol is constitutional because it is very similar to the protocol used in Kentucky, which was approved by the United States Supreme Court in *Baze v. Rees*, 128 S. Ct. 1520 (2008). Defendants state that the Supreme Court did not look into the qualifications of the persons who would be mixing and administering the thiopental. The State argues that plaintiffs' claims should be dismissed because there is no

evidence that any errors occurred at past executions and even if there had been errors, Missouri has now adopted a written protocol that has added additional safeguards. Additionally, the State argues that regardless of who is administering the chemical and what their training may be, under the protocol, there are constitutionally adequate safeguards to prevent any likelihood that a condemned prisoner will experience any significant pain during their execution. The State argues that under *Baze*, the specific qualifications of the particular members of the execution team is not a relevant inquiry.

Plaintiffs state in response that their Complaint includes detailed allegations that defendants' procedures and personnel subject them to a substantial risk that could be easily alleviated. Plaintiffs argue that the State has historically employed execution personnel who have been unable to perform many of the critical tasks required to carry out an execution humanely. Plaintiffs state that the Department of Corrections will fail and has failed to adequately train and support these personnel in their performance of the execution procedure. These failures are likely to lead to the maladministration of the execution procedure because the protocol leaves to the discretion of the execution team how several of the steps of the procedure will be carried out. Plaintiffs state that they have adequately pled a violation of their Eighth Amendment rights because they have alleged: (1) a "substantial risk of serious harm," and (2) feasible measures that if taken would "significantly reduce

[the] substantial risk." *Baze*, 128 S. Ct. 1531-32. Plaintiffs also dispute the defendants' argument that *Baze* forecloses the factual basis for their claim. Plaintiffs argue that the Supreme Court did not hold that the training or experience of the execution team personnel could never be considered or might not be a factor in some future case. Plaintiffs state that the Supreme Court simply found that these were not issues in the Kentucky case. Plaintiffs also state that they have plead the existence of feasible less dangerous alternatives as required by *Baze*. Finally, plaintiffs state that they have adequately pled a violation of their right to information about the manner in which they will be executed.

In reply, defendants argue that there is no substantial risk of serious harm under Missouri's protocol because licensed medical personnel will prepare the drugs, set the IV's and check the inmate for signs of consciousness and inspect the IV site. Defendants argue that the Supreme Court found it unnecessary to probe behind the licensure of the team members into the details of their backgrounds, because these individuals are authorized to provide their services to the public. Defendants also argue that the allegations about incompetent personnel also fail because of the safeguards which are provided under the protocol to ensure that the prisoner will be unconscious before the second and third drugs are administered. The State also argues that the plaintiffs' alternatives will not reduce any substantial risk of harm. Finally, defendants

argue that the plaintiffs have adequate notice of the procedures to be used at their executions.

"The standard of review for a Rule 12(c) motion is essentially the same as for Rule 12(b)(6). . . .[A] complaint must plead enough facts to state a claim to relief that is plausible on its face. . . . This does not require heightened fact pleading." *Osby*, 2008 WL 2074102 at * 1 (internal citations and quotations omitted). Defendants go to great lengths to explain how Missouri's lethal injection protocol is similar to that of Kentucky's and argue that because the Supreme Court found Kentucky's protocol was constitutional, plaintiffs have no basis on which to challenge Missouri's protocol. However, the allegations which the plaintiffs are raising in this case were not at issue and were not squarely addressed by the Supreme Court in *Baze*. There is nothing in the *Baze* opinion which prevents plaintiffs from bringing the instant action.

IV. CONCLUSION

Accordingly, as there is no insuperable bar to relief, the Court hereby **DENIES** defendants' Motion for Judgment on the Pleadings (Doc. # 47).

Date: 6/30/08
Kansas City, Missouri

S/ FERNANDO J. GAITAN, JR.
Fernando J. Gaitan, Jr.
Chief United States District Judge

Appendix D

United States Court of Appeals
for the Eighth Circuit

No. 08-2895

Reginald Clemons, et al.,
Appellants

John C. Middleton, et al.,

v.

Larry Crawford, et al,
Appellees

Appeals from the United States District Court for the
Western District of Missouri - Jefferson City
(2:07-cv-04129-FJG)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Benton took no part in the consideration or decision of this matter.

December 22, 2009

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix E

In the United States District Court
Western District of Missouri
Central Division

Reginald CLEMONS,
Richard D. CLAY, Jeffrey
FERGUSON, and
Roderick NUNLEY,
Plaintiffs, Case No. 07-4129-CV-C-FJG

v.

Larry CRAWFORD,
James D. PURKETT,
Terry MOORE, and John
DOES 1-50,
Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Reginald Clemons, Richard D. Clay, Jeffrey Ferguson, and Roderick Nunley, by their attorneys, allege as follows:

NATURE OF THE ACTION

1. On June 4, 2007, the United States Court of Appeals for the Eighth Circuit ruled that the Missouri Department of Corrections ("DOC") could proceed with executions pursuant to a revised lethal injection protocol. In so doing, the Court

stated that "it is imperative that the State employ personnel who are properly trained to competently carry out each medical step of the procedure." Slip Op. at 18. The DOC, however, historically has failed to recruit and train competent, fit individuals to serve on the execution team, and DOC officials intend to perform executions using personnel who are inadequately trained, qualified, and screened, in direct contravention of the Eighth Circuit's directive.

2. Plaintiffs are prisoners in the custody of the DOC, each of whom is currently under sentence of death by the State of Missouri. Plaintiffs bring this action under 42 U.S.C. § 1983, seeking declaratory and injunctive relief in order to prohibit Defendants from executing Plaintiffs in a manner likely to involve the wanton and unnecessary infliction of severe pain and suffering in violation of those rights guaranteed to Plaintiffs by the Eighth and Fourteenth Amendments to the Constitution of the United States.

3. Defendants, under authority of the State of Missouri, conduct executions through the successive injection of three chemicals. The first chemical, thiopental, is designed to render the condemned inmate unconscious prior to the administration of the second and third drugs. The second drug, pancuronium bromide or "pavulon," is designed to paralyze the inmate so as to give the appearance that the inmate's death is a peaceful one. Finally, the third drug, potassium chloride, is designed to travel though the inmate's veins to the

heart where it causes a massive and fatal heart attack.

4. Should an inmate fail to be properly or fully anesthetized by the thiopental, the inmate will feel extreme pain as the third drug, potassium chloride, travels through the inmate's veins en route to the heart, as well as the terrifying feeling of conscious asphyxiation caused by the pancuronium. Because the inmate is paralyzed, however, he or she will be completely unable to communicate his suffering to those witnessing the execution.

5. Because of the grave risk that a condemned inmate will experience severe excruciating pain if the lethal injection procedure is not performed properly, the Constitution requires that executions by lethal injection be overseen by personnel with qualifications and training sufficient to ensure that the condemned inmate is, and remains, fully anesthetized during injection of the second and third drugs in the protocol.

6. Defendant Crawford, however, has a well-documented history of employing incompetent and unqualified personnel to oversee this crucial element of executions by lethal injection. Accordingly, under the lethal injection protocol by which Defendants intend to execute Plaintiffs there exists a substantial likelihood that the personnel charged with carrying out Plaintiffs' executions are unqualified or otherwise unfit to do so.

7. Defendant Crawford also has a well-documented history of refusing properly to train the individuals to whom responsibility for crucial tasks

in the lethal injection process is delegated. Accordingly, there exists a substantial likelihood that the personnel charged with carrying out Plaintiffs' executions are improperly trained or otherwise unfit to discharge these responsibilities.

8. The delegation of such critical responsibilities to incompetent or improperly trained personnel creates a grave risk that the procedure will not be carried out according to its design and that as a result Plaintiffs will suffer excruciating and unnecessary pain prior to their deaths.

9. Upon information and belief, despite their clear awareness of this risk, Defendants have not made arrangements for properly qualified and trained personnel to perform those tasks necessary to ensure that Plaintiffs do not face a grave and unnecessary risk of suffering excruciating pain prior to their deaths.

10. Because the Constitution requires that executions by lethal injection be carried out by individuals with qualifications and training sufficient to ensure that Plaintiffs are, and remain, properly anesthetized during administration of the second and third drugs in the three drug sequence, Defendant Crawford's failure to ensure that the personnel charged with oversight of these executions are properly trained and qualified constitutes deliberate indifference to Plaintiffs' constitutional rights.

11. Defendants' newly submitted protocol exposes Plaintiffs to a grave risk that they will

experience unconstitutional pain and suffering prior to death.

JURISDICTION AND VENUE

12. This action arises under 42 U.S.C. § 1983 for violations of the Eighth and Fourteenth Amendments of the United States Constitution. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1343 (civil rights violations), 28 U.S.C. § 2201 (declaratory relief), and 28 U.S.C. § 2202 (further relief).

13. This Court has personal jurisdiction over Defendants as they are residents of the State of Missouri and are presently located in the State of Missouri.

14. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391.

15. Plaintiffs have each exhausted all available administrative remedies.

PARTIES

16. Plaintiff Reginald Clemons is a citizen of the United States and a resident of the State of Missouri. Mr. Clemons, who has been sentenced to death by the State of Missouri, is currently an inmate at the Potosi Correctional Center in Mineral Point, Missouri and is in the custody of the DOC.

17. The State of Missouri has moved the Missouri Supreme Court to set an execution date for Mr. Clemons. The motion remains pending, and no execution date has yet been set for Mr. Clemons.

18. Plaintiff Richard Clay is a citizen of the United States and a resident of the State of Missouri. Mr. Clay, who has been sentenced to death by the State of Missouri, is currently an inmate at the Potosi Correctional Center in Mineral Point, Missouri and is in the custody of the DOC.

19. The State of Missouri has moved the Missouri Supreme Court to set an execution date for Mr. Clay. The motion has been granted, but no execution date has yet been set for Mr. Clay.

20. Plaintiff Jeffrey Ferguson is a citizen of the United States and a resident of the State of Missouri. Mr. Ferguson, who has been sentenced to death by the State of Missouri, is currently an inmate at the Potosi Correctional Center in Mineral Point, Missouri and is in the custody of the DOC.

21. The State of Missouri has moved the Missouri Supreme Court to set an execution date for Mr. Ferguson. The motion remains pending, and no execution date has yet been set for Mr. Ferguson.

22. Plaintiff Roderick Nunley is a citizen of the United States and a resident of the State of Missouri. Mr. Nunley, who has been sentenced to death by the State of Missouri, is currently an inmate at the Potosi Correctional Center in Mineral Point, Missouri and is in the custody of the DOC.

23. The State of Missouri has moved the Missouri Supreme Court to set an execution date for Mr. Nunley. The motion has been granted, but no execution date has yet been set for Mr. Nunley.

24. Defendant Larry Crawford is the Director of the Department of Corrections of the State of Missouri. Defendant Crawford's office is located in Jefferson City, Cole County, Missouri, and he resides within the Central Division of the United States District Court for the Western District of Missouri.

25. Defendant Crawford is authorized and directed by statute to provide "the necessary appliances for carrying into execution the death penalty by means of the administration of lethal gas or by means of the administration of lethal injection." Mo. Rev. Stat. § 546.720. At all times, and in all actions referred to in this complaint, Defendant Crawford has acted, and will continue to act, under color of state law, and he is sued in his individual capacity and official capacity for the purpose of obtaining declaratory and injunctive relief.

26. Missouri law charges Defendant Crawford with responsibility for carrying out judicially mandated executions and vests Defendant Crawford with complete discretion as to the particular procedures through which such executions are carried out, including discretion to designate the types and quantities of chemicals used, as well as the personnel who assist in all aspects of the procedure.

27. Defendant Crawford has no medical education or training.

28. Defendant James D. Purkett is the Superintendent of the Eastern Reception, Diagnostic & Correctional Center ("ERDCC"), which is where the State of Missouri has been conducting its

executions since April 27, 2005. Between 1990 and 2005, all lethal injection executions occurred at the Potosi Correctional Center in Mineral Point, Missouri. Defendant Purkett's office is at the ERDCC, which is located in Bonne Terre, St. Francois County, Missouri, and he resides within the Eastern Division of the United States District Court for the Eastern District of Missouri.

29. By statute, executions take place in the presence of Defendant Purkett. *See* Mo. Rev. Stat. § 546.740. At all times, and in all actions referred to in this complaint, Defendant Purkett has acted, and will continue to act, under color of state law, and he is sued in his individual capacity and official capacity for the purpose of obtaining declaratory and injunctive relief.

30. Defendant Terry Moore is the Director of Adult Institutions for the State of Missouri. Defendant Moore's office is located in Jefferson City, Cole County, Missouri. Defendant Moore is a resident of the Central Division of the United States District Court for the Western District of Missouri.

31. Defendant Moore was actively involved in the recent executions of Timothy Johnston and Marlin Gray. At all times, and in all actions referred to in this complaint, Defendant Moore has acted, and will continue to act, under color of state law, and he is sued in his individual capacity and official capacity for the purpose of obtaining declaratory and injunctive relief.

32. Plaintiffs are ignorant of the true names of Roes 1-50 but allege that they will

participate in Plaintiffs' executions by virtue of their roles in designing, implementing, and/or carrying out the lethal injection process.

HISTORY OF LETHAL INJECTION IN MISSOURI

33. The DOC's longstanding disregard for the dangers inherent in the DOC's chosen three-drug execution method was revealed through discovery in the *Taylor v. Crawford* litigation, No. 05-4173 (W.D. Mo.). The Defendants have chosen to execute inmates using drugs that are extremely sensitive to error and painful when improperly administered, yet have consistently refused to implement the safeguards necessary to reasonably ensure that the three-drug cocktail does not cause excruciating pain.

34. In the early to mid-1990s, Defendants or their predecessors performed lethal-injection executions using an injection machine in combination with personnel who had little to no medical training and knew little about the drugs used to perform executions. Unsurprisingly, Defendants or their predecessors soon botched an execution -- that of Emmett Foster -- "which [according to testimony] caused a flurry in the press and embarrassment to the prison." In response, Defendants or their predecessors recruited a surgeon to oversee executions.

35. Yet even as late as October 2005, the date of the last execution conducted in Missouri, Defendants had established no written protocol governing the conduct of executions by lethal injection. Rather, Defendants vested complete responsibility for designing, overseeing and

performing all tasks necessary to the execution procedure (except the actual injection) in John Doe #1, see infra at___, despite the State's knowledge of Doe #1's medical licensure problems and problematic malpractice history. Indeed, the most recent executions supervised by Defendant Crawford were conducted according to the informal protocol that was developed by John Doe #1 (see infra at ¶ __). This informal protocol was not modeled after that employed by any other State and has been used in at least the past six executions conducted under authority of the State of Missouri.

36. Under the unwritten protocol, executions by lethal injection were carried out by the successive injection of three drugs. The first drug, thiopental, is an ultra short acting barbiturate designed to render the inmate unconscious. The second drug, pancuronium bromide or pavulon, completely paralyzes the condemned inmate. The third drug, potassium chloride causes the inmate to suffer a fatal heart attack.

37. Should the thiopental fail to fully anesthetize the condemned inmate, either as a result of improper delivery or otherwise, or should the inmate not remain in a surgical plane of anesthesia through the execution procedure, the condemned inmate would suffer excruciating pain upon injection of the potassium chloride. The inmate, however, would be unable to communicate that suffering as he would be paralyzed by the pavulon.

38. The successful administration of thiopental depends on the proper performance of a

series of complex steps, including mixing the thiopental into solution, calculating doses, inserting the drugs into syringes, inserting the IV catheters and injecting the drugs through many feet of IV tubing from a separate, darkened room. When these tasks are performed by poorly prepared personnel who are incompetent or have little or no medical training, as has been the case in Missouri, the foreseeable opportunities for catastrophic errors multiply.

39. As a result of the very real danger that a condemned inmate may suffer extreme pain should the lethal injection procedure be carried out improperly, it is imperative that properly trained medical personnel be present at the execution in order to ensure:

- that the proper quantities of drugs are prepared for use in the procedure;
- that the thiopental solution is properly prepared;
- that the IV line is properly set such that the drugs will effectively be introduced into the inmate's circulatory system;
- that IV placement itself does not result in the infliction of unnecessary and severe pain, as would be the case if untrained personnel performed a central line catheterization or venous cutdown;

- that upon commencement of the injection, the drugs flow unimpeded through the IV line;
- that the inmate achieves a surgical plane of anesthesia prior to administration of the pavulon;
- that the IV line is properly flushed following injection of the thiopental; and
- that the inmate remains at a surgical plane of anesthesia throughout injection of the pavulon and potassium chloride.

40. On June 3, 2005 Michael Anthony Taylor, an inmate held by the DOC, filed a § 1983 action in the United States District Court for the Western District of Missouri seeking injunctive relief and alleging that Defendant Crawford's unwritten protocol for carrying out executions by lethal injection violated his Eighth and Fourteenth Amendment rights as guaranteed by the U.S. constitution.

41. Discovery obtained in the course of that lawsuit revealed that in connection with the performance of executions by lethal injection, Defendant Crawford had utilized the services of a Board Certified Surgeon, and a licensed vocational nurse, designated in that case as John Doe #1 and John Doe #2 respectively. According to sworn interrogatory responses submitted by Defendant Crawford in *Taylor v. Crawford*, John Doe #1's functions at the executions were to prepare the solution of thiopental and to monitor the inmate's

heart rate and ultimately to pronounce death. In sworn testimony, Defendant Crawford further reaffirmed his statement that he retains sole authority over the type and quantities of drugs used in the execution process.

42. Discovery in the *Taylor* case further elicited Defendant Crawford's statement that the unwritten protocol calls for administration of five grams of thiopental. On this basis, Defendants' expert in *Taylor*, Dr. Mark Dershwitz, opined with 99.9% certainty that no inmate could remain conscious having been administered such a dose of thiopental.

43. Facts developed in the course of discovery in the *Taylor* case, however, revealed a much more sordid truth. In particular, documents produced by the DOC revealed that John Doe #1 took advantage of Defendants' abdication of responsibility to arbitrarily and secretly vary the dose of thiopental from execution to execution. The evidence in the *Taylor* case demonstrated that John Doe #1 had consistently prepared substantially less anesthetic than the DOC represented in court would be used for Taylor's scheduled execution and that of other inmates. Because Doe had difficulty calculating and mixing doses, there is no way of determining how much anesthetic was actually administered in any execution.

44. Subsequent discovery, including a deposition of John Doe #1, confirmed that Defendant Crawford was not aware of these alterations of the unwritten protocol, which were nothing more than

John Doe #1's attempt to improvise as a result of his inability properly to mix the thiopental.

45. In further contradiction of Defendant Crawford's sworn statements, John Doe #1 testified in the Taylor case that he had complete discretion under the unwritten protocol to alter the protocol as he saw fit. When John Doe #1 was asked whether he had "any discussions with Director Crawford about the scope of [his] authority," John Doe #1 replied, "Oh, yes. . . . And again, [Crawford] has no background in corrections and no background in medicine . . . . Since he has no background in either field, he reiterated that he's totally dependant on me advising what could and should and will be done . . . ." John Doe #1 June 5, 2006 dep. tr. at 63:19-25 – 64:1-5. When further asked whether Defendant Crawford would defer to John Doe #1's opinion if he thought a change to the execution procedure needed to be made, John Doe #1 responded, "Absolutely." Id. 64:9-12. Thus, the numerous secret variations in the procedure as performed by John Doe #1 were the direct result of Defendant Crawford's abdication of all responsibility for the performance of executions to John Doe #1.

46. Discovery in *Taylor* also revealed a host of shocking facts about John Doe #1. Despite his reported status as a board certified surgeon, upon information and belief John Doe #1:

- is dyslexic and often confuses and/or transposes numbers;

- could not recall, even with the aid of execution logs, how much thiopental he delivered to inmates in past executions;
- understands his job as bringing about the inmate's death "with no apparent suffering that the public can observe, which they will make the most of;" and
- has been barred from practicing medicine in at least two hospitals in the State of Missouri.

47. Following a hearing on the merits, on June 26, 2006 the United States District Court issued an opinion and Order finding that "Missouri's lethal injection procedure subjects condemned inmates to an unnecessary risk that they will be subject to unconstitutional pain and suffering when the lethal injection drugs are administered." The District Court, therefore, issued an injunction prohibiting the State of Missouri from conducting any further executions under the unwritten protocol and ordered the Defendants to submit to the Court a revised written protocol for the conduct of executions by lethal injection.

48. In the course of its Opinion and Order the District Court stated:

> In addition to the fact that there is no oversight and the responsibility for making changes or adjustments is completely vested in one individual, the Court also has concerns about John Doe I's qualifications. John Doe I readily

admitted that he is dyslexic and that he has difficulty with numbers and oftentimes transposes numbers. John Doe I testified "it's not unusual for me to make mistakes. . . . But I am dyslexic and that is the reason why there are inconsistencies in my testimony. That's why there are inconsistencies in what I call drugs. I can make these mistakes, but it's not medically crucial in the type of work I do as a surgeon." (John Doe Depo. p. 25). The Court disagrees and is gravely concerned that a physician who is solely responsible for correctly mixing the drugs which will be responsible for humanely ending the life of condemned inmates has a condition which causes him confusion with regard to numbers. As the Court has learned, the process of mixing the three different drugs and knowing the correct amount of the drugs to dissolve in the correct amount of solution involves precise measurements and the ability to use, decipher, and not confuse numbers. Although John Doe I does not feel this is crucial in the type of work he does as a surgeon, it is critical when one is mixing and dissolving chemicals for a lethal injection.

49. The *Taylor v. Crawford* litigation thus provided DOC officials, particularly Defendant Crawford, with the opportunity to learn about the

deficiencies in the DOC's execution personnel, as well as the numerous risks created by the DOC's use of the three-drug cocktail and haphazard execution practices. Despite being confronted with this evidence, Crawford continued to insist that John Doe #1 was "bright" and "professional," and Defendant Moore also reaffirmed his confidence in Doe. Moreover, despite the extensive evidence at trial regarding the excruciating pain caused by potassium chloride – evidence with which the DOC's expert did not disagree – Crawford stated that there was no need to consult with medical personnel because executions are not "medical procedure[s] that require[ ] somebody to undergo anesthesia or to be rendered unconscious," and in any event, the DOC is not equipped to do procedures requiring anesthesia.

50. Pursuant to the District Court's Order, on July 14, 2006 Defendants submitted a written execution protocol to the District Court. Upon information and belief, this was the first written lethal injection protocol created by the DOC.

51. Despite the District Court's clear misgivings about the training and qualifications of the medical personnel involved in executions conducted under the unwritten protocol, and Defendants' awareness of the dangers created by having incompetent and unfit personnel such as John Doe #1 run the execution procedures, the new written protocol, attached hereto as Exhibit A, fails to provide any specific information concerning the qualifications or training required of the medical personnel whose services Defendants intend to use in

the course of an execution. Rather, the newly submitted protocol explains only that "a physician, nurse, or pharmacist prepares the chemicals used during the lethal injection" and further states that "a physician, nurse, or emergency medical technician . . . inserts intravenous lines, monitors the prisoner, and supervises the injection of lethal chemicals by non-medical members of the execution team."

52. Notably absent from Defendants' newly proposed protocol is any requirement that the designated medical personnel will have training and qualifications sufficient to ensure that the condemned inmate reaches and maintains a surgical plane of anesthesia and have no other specific disqualifying characteristics.

53. Beyond its failure to require the participation of personnel competent to ensure that the inmate achieves and maintains a surgical plane of anesthesia, Defendants' new written protocol merely codifies virtually all of the unsafe practices that rendered the original, unwritten protocol constitutionally infirm. Defendants Crawford and Moore can no longer claim ignorance of the dangers created by the use of the three-drug cocktail and Defendants' deficient practices and personnel, having heard the extensive evidence proffered by Taylor and credited by the District Court. Nevertheless, Defendants have consciously disregarded those dangers in crafting the new protocol.

54. For instance, Defendants have chosen to continue to use pancuronium and potassium chloride

in the execution procedure even though those drugs are unnecessary in causing death and their omission from the protocol would alleviate the risk of inflicting excruciating pain and/or conscious asphyxiation and significantly lower the risk of botching an execution. In fact, Dr. Mark Dershwitz, the medical expert retained by Defendants to defend their protocol, has advised several states that using a single barbiturate as the sole lethal agent would be an easier, less complex, and less dangerous means of accomplishing executions. Upon information and belief, Dr. Dershwitz has provided Defendants with the same advice. Defendants failed to give serious consideration to the use of a single-drug protocol, even though they still have no reliable method to ensure that Plaintiffs will be unconscious at all times following the administration of thiopental.

55. In addition, Defendants' new protocol permits execution personnel to arbitrarily decide to use a central line catheterization to obtain IV access without medical justification. The protocol does not require that qualified personnel perform the procedure, or that the execution personnel have the equipment necessary to treat the foreseeable complications of central line placement. Central line catheterization is an invasive procedure that involves the insertion of a catheter in one of several veins located deep beneath the skin, including the femoral, subclavian, and internal jugular veins. Placement of a catheter in any of these veins involves a risk of life-threatening and excruciating complications, including severe bleeding and/or a pneumothorax, in which the chest cavity fills up with

air and/or blood. Proper performance of central line catheterization requires specially trained personnel – in all but rare cases, only physicians with specific training can place central lines – and special equipment to treat complications. John Doe #1 previously used one type of central line – femoral catheterization – as the first-choice means of obtaining IV access in all executions, even though peripheral IV access, which is easier, less dangerous, and less invasive, could have been obtained in these inmates. On at least one occasion, Doe #1 botched a femoral line placement, resulting in a hematoma and probable arterial puncture. On at least one occasion, John Doe #1 placed a subclavian central line in an inmate because he was unable to place a femoral line quickly enough. Doe #1 admitted that he did not have the proper equipment to do so, and Defendant Crawford acquiesced in this decision. In drafting the new protocol to allow the use of central lines despite Defendants' knowledge of the dangers of the procedure and previous difficulties in performing it, Defendants have consciously disregarded foreseeable risks of excruciating pain.

56. Defendants' newly proposed protocol also fails to ensure that the inmate's level of anesthetic depth is sufficiently monitored during the lethal injection procedure. As an initial matter, the new protocol does not require that medical personnel use any established technique to monitor the inmate's level of anesthesia. Use of an electrocardiogram, as suggested by the new protocol, is insufficient to ensure that that an inmate remains at a surgical plane of anesthesia. Furthermore, the

mere observation of an inmate's facial expression, especially when done through a mirror as contemplated by the protocol is also insufficient to ensure maintenance of a surgical plane of anesthesia.

57. On September 12, 2006 the District Court issued an Order finding that Defendants' newly proposed protocol offered insufficient protection against the risk that an inmate would experience unconstitutional pain and suffering in the lethal injection process.

58. Rather than attempting to amend the protocol as required by the District Court, on October 18, 2006, Defendants appealed the District Court's findings to the United States Court of Appeals for the Eighth Circuit.

59. On April 17, 2007 Defendants' counsel sent a letter to the Eighth Circuit stating that John Doe #1 would not be used in any future executions.

60. On June 4, 2007 the United States Court of Appeals for the Eighth Circuit issued an opinion vacating the district court's injunction. The Eighth Circuit analyzed the facts of the case under the controlling Eighth Amendment standard which forbids any carrying out executions in a manner that creates "a foreseeable risk of . . . gratuitous and unnecessary pain." In its Opinion, the Eighth Circuit reiterated the requirement that the properly qualified and properly trained personnel be employed to oversee the execution process. In particular the Eighth Circuit stated that "[b]ecause of the pain that would undoubtedly be inflicted by

the third chemical if administered without adequate anesthetization, it is imperative for the State to employ personnel who are properly trained to competently carry out each medical step of the procedure."

61. The Eighth Circuit's opinion further recognized that certain "disqualifying characteristics" could render otherwise properly trained personnel unqualified to discharge the essential functions in the lethal injection context.

62. Mr. Taylor's petition for rehearing en banc remains pending before the Eighth Circuit. The Eighth Circuit's mandate in *Taylor* has not yet issued and accordingly the District Court's injunction remains in effect.

63. On June 18, 2007 Mr. Clemons's counsel sent a letter to the Defendant's Counsel seeking information concerning the training and qualifications of the medical personnel designated to assist in the executions of Plaintiffs.

64. On June 27, 2007, Defendants counsel responded by letter that such request was "premature" as "[n]o one has yet been designated to have a role in the administration of the lethal chemicals to Mr. Clemons because no execution date has been set."

65. Plaintiffs, however, are entitled by due process of law to receive information regarding the qualifications, training and fitness of execution team members. The Eighth Circuit has recognized the importance of these characteristics of execution

personnel to the constitutionality of the State's execution procedures. Even Director Crawford has recognized the importance of subjecting information regarding the education and work history of the execution team to public scrutiny. *See* C. Wittenauer, Missouri Acts to Protect Executioners, Forbes (May 21, 2007), available at http://www.forbes.com/feeds/ap/2007/05/21/ap3744179.html. There is no legitimate state justification for withholding such information, particularly in light of Plaintiffs' willingness to abide by a reasonable protective order designed to protect identifying information.

66. John Doe #1's absence apparently leaves the DOC with no execution personnel who have sufficient training and experience properly to implement the procedure. The DOC recruited Doe because its other personnel had been unable to avoid botching executions in a manner that was visible to the public. John Doe #1's dominance of the procedure made additional training of the other personnel unnecessary. Indeed, at the time of the District Court hearing in the *Taylor* case, the other three execution team members were not competent to perform executions: two had no medical training whatsoever, and John Doe #1 stated that they were unable to properly perform their tasks without his close supervision; and the third had training as a nurse but was unable to tell, despite personal observation, that John Doe #1 consistently prepared the wrong dose of thiopental.

67. More broadly, because sole responsibility for executions was vested in Doe, the DOC's officials never developed the basic understanding of the lethal injection procedure and its risks. Doe's departure thus leaves a knowledge vacuum at all levels of the DOC -- but as the DOC's confidence in John Doe #1 demonstrates, DOC officials are unable to discern whether people are competent or fit to participate in executions. Nor does it appear that the DOC has an impetus to place a high priority on the competence of its personnel. As Doe testified, the DOC's use of a drug that paralyzes inmates guarantees the achievement of the DOC's primary objective in performing executions: to ensure that they are fast and do not cause witnesses to wonder if anything went wrong.

68. The combination of personnel who are likely untrained and incompetent, indifferent officials in charge, and a complicated procedure using painful drugs that are extremely sensitive to error is a recipe for disaster.

CLAIMS FOR RELIEF

COUNT I

CLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF THAT MISSOURI'S EXECUTION PROTOCOL IS UNCONSTITUTIONAL AS APPLIED

69. Plaintiffs hereby repeat and reallege paragraphs 1-61 as fully set forth herein.

70. The manner and means of the administration of lethal injection as contemplated by

Defendants is unconstitutional. Despite the clear danger that an inmate will suffer excruciating pain should the lethal chemicals be improperly prepared or administered, Defendants have demonstrated a failure to employ qualified and trained personnel to discharge the medical tasks associated with the lethal injection procedure.

71. Based on Defendants' past failure to employ qualified and trained personnel to oversee medical aspects of the lethal injection procedure, there exists a substantial likelihood that the personnel Defendants select to discharge such responsibilities in the context of Plaintiffs' executions will be similarly lacking in proper training and qualifications.

72. Based on Defendants' past failure to employ qualified and trained personnel to oversee medical aspects of the lethal injection procedure, there exists a substantial likelihood that the personnel Defendants select to discharge such responsibilities in the context of Plaintiffs' executions will suffer from disqualifying characteristics such that they are otherwise unfit to discharge the medical tasks associated with the lethal injection procedure.

73. Defendants' failure to employ qualified and trained personnel to oversee medical aspects of the lethal injection procedure results in a grave risk that Plaintiffs will experience unconstitutional pain and suffering in the course of their executions in violation of their rights as guaranteed by the Eighth

and Fourteenth Amendments to the United States Constitution.

74. Defendants' newly submitted protocol exposes Plaintiffs to a substantial likelihood that they will experience unconstitutional levels of pain and suffering in the course of their executions.

75. In connection with the claims raised in Count I, Plaintiffs state that they have no adequate remedy at law and would suffer irreparable harm in the absence of an injunction.

COUNT II

VIOLATION OF PLAINTIFFS' RIGHT TO DUE PROCESS OF LAW

76. Plaintiffs hereby repeat and reallege Paragraphs 1-61 as if fully set forth herein.

77. Despite the clear danger that an inmate will suffer excruciating pain should the lethal chemicals be improperly prepared or administered, Defendants have refused to provide Plaintiffs with relevant information concerning the fitness of those charged with carrying out the medical related tasks at the execution.

78. The DOC's new protocol is purposefully written to be so vague as to lack meaningful information regarding the level of training and qualifications of the personnel who will perform Plaintiffs' executions. The protocol contemplates that the entire execution may be performed by an Emergency Medical Technician or Licensed Vocational Nurse. These paraprofessionals do not

have extensive medical training and are unable and not permitted to perform many procedures that doctors perform, including central line placement. The execution therefore may be accomplished by different means depending on the qualification level of the personnel.

79. In addition, EMTs and LVNs are substantially less able to respond to foreseeable complications in the execution procedure and have substantially less experience performing some of the necessary tasks, such as mixing thiopental or administering intravenous drugs, than pharmacists or doctors. Thus, the qualification level of the personnel used materially affects the nature and extent of the risks involved in the execution process.

80. The Defendants' protocol provides instructions for the execution process at a very high level of generality, leaving to the discretion of the execution team how many crucial steps will be accomplished. These include, but are not limited to, the manner in which the thiopental will be mixed and prepared; the criteria for determining the means of IV access; backup procedures if the first-choice method of IV access cannot be obtained; level of lighting and permissible means of protecting anonymity so as not to interfere with the humaneness of the procedure; and contingency plans for reacting to foreseeable problems such as failure of both IV lines. Execution personnel will have to develop customary practices with respect to these issues and many others, because they are not dictated by the protocol. The practices developed

and their reliability will depend to some extent on the qualifications and training of the execution personnel.

81. The fact that Defendants have not yet "designated" execution teams indicates that the DOC does not yet know the qualifications of its execution team. Upon information and belief, the fact that team members have not yet been designated means that team members have not yet performed any rehearsals or otherwise begun developing the practices that will be necessary to implement the DOC's vague protocol. Defendants are thus completely unprepared to conduct executions, even though they have moved for execution dates.

82. By waiting until the last minute to designate its execution personnel, by maintaining a vague protocol, and by allowing a wide range of personnel to participate, the DOC increases the probability that executions will be performed in an arbitrary, ad hoc manner, just as they were under John Doe #1. Defendants are creating a situation in which each execution is used as practice for the next, and the procedure evolves on the fly. Defendant Crawford's demonstrated willingness to abdicate responsibility for the procedure to the execution personnel, and his lack of medical expertise and engagement with the procedure, also increase the probability that execution personnel will arbitrarily vary from execution to execution.

83. The Eighth Amendment and the Due Process Clause of the Fourteenth Amendment require that Plaintiffs be provided with a meaningful

opportunity to evaluate and challenge Defendants' execution procedures' compliance with Eighth Amendment standards.

84. The Eighth Amendment and the Due Process Clause prohibit Defendants from administering their execution procedures in such a manner as to prevent Plaintiffs from knowing how they will be executed before the execution takes place.

85. By maintaining the arbitrary procedures described above, Defendants are violating the Eighth Amendment and Due Process Clause by preventing Plaintiffs from knowing in advance how they will be executed because Defendants, having fostered an ad hoc, improvisatory system without supervision, will not know in advance what actions the hastily created execution team will take in implementing the protocol.

86. By refusing to provide Plaintiffs with information regarding the training, qualifications, and background of current and already-known prospective execution personnel -- information that is unquestionably relevant to Plaintiffs' challenge to the execution procedures and which the Defendants have no legitimate justification for withholding -- Defendants are violating the Eighth Amendment and Due Process Clause.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that the Court enter judgment as follows:

a. On the first cause of action, entering an Order declaring that Missouri's lethal injection procedure violates the Eighth and Fourteenth Amendments to the United States Constitution and entering an Order permanently enjoining Defendants from conducting executions pursuant to that protocol and enjoining Defendants from employing untrained, unqualified or otherwise unfit personnel to discharge the medical responsibilities involved in the lethal injection procedure.

b. On the second cause of action, entering an Order declaring that Defendants' refusal to provide Plaintiffs with sufficient information bearing on the training and qualifications of the personnel to be charged with overseeing the medical aspects of Plaintiffs' executions constitutes a violation of Plaintiffs' rights to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

c. For costs, attorney's fees, and any such further relief as the Court may deem just and proper.

Dated: July 9, 2007

Respectfully submitted,

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EXHIBIT
A

PREPARATION AND INJECTION OF CHEMICALS

A. Execution team members

1. The execution team consists of contracted medical personnel and department employees.

2. A physician, nurse, or pharmacist prepares the chemicals used during the lethal injection.

3. A physician, nurse, or emergency medical technician (EMT–intermediate or EMT–paramedic) inserts intravenous lines, monitors the prisoner, and supervises the injection of lethal chemicals by nonmedical members of the execution team.

4. Two department employees inject the chemicals into the prisoner.

B. Preparation of chemicals

1. Medical personnel prepare the lethal chemicals. The quantities of these chemicals may not be changed without prior approval of the department director. Fifteen (15) syringes are prepared and labeled in a distinctive manner as follows.

2. Syringes 1, 2, 3, and 4 each contain 1.25 grams of thiopental (also known as sodium thiopental or sodium pentothal) in a 50 cc solution for a total of 5 grams of thiopental.

3. Syringe 5 contains 30 cc of saline solution.

4. Syringe 6 contains 60 milligrams of pancuronium bromide in a 60 cc solution.

5. Syringe 7 contains 30 cc of saline solution.

6. Syringes 8 and 9 each contain 120 milliequivalents of potassium chloride in 60 cc of solution for a total of 240 milliequivalents of potassium chloride.

7. Syringe 10 contains 60 cc of saline solution.

Exhibit A

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8. Syringes 1A, 2A, 3A, and 4A each contain 1.25 grams of thiopental (also known as sodium thiopental or sodium pentothal) in a 50 cc solution for a total of 5 grams of thiopental. (These syringes are prepared in the event that additional thiopental must be administered.)

9. Syringe 5A contains 60 cc of saline solution. (This syringe is prepared in the event that additional flush is required.)

C. Intravenous lines

1. Medical personnel determine the most appropriate locations for intravenous (IV) lines. They insert both a primary IV line and a secondary IV line unless the prisoner's physical condition makes it unduly difficult to insert more than one IV. Medical personnel may insert the primary IV line as a peripheral line or as a central venous line (e.g., femoral, jugular, or subclavian) provided they have appropriate training, education, and experience for that procedure. The secondary IV line is a peripheral line.

2. A sufficient quantity of saline solution is injected to confirm that the IV lines have been properly inserted and that the lines are not obstructed.

D. Monitoring of prisoner

1. Medical personnel attach the leads from the electrocardiograph to the prisoner's chest. Medical personnel check the electrocardiograph to confirm that it is functioning properly.

2. The gurney is positioned so that medical personnel can observe the prisoner's face directly or with the aid of a mirror.

3. Medical personnel monitor the electrocardiograph and the prisoner during the execution.

E. Administration of chemicals

1. Upon order of the department director, the chemicals are injected into the prisoner by the execution team members under the observation of medical personnel. The lights in the execution support room are maintained at a sufficient level to permit proper administration of the chemicals.

2. The thiopental is injected from syringes 1, 2, 3, and 4 (5 grams). The saline solution in syringe 5 (30 cc) is injected.

3. Before the second and third chemicals are injected, medical personnel physically examine the prisoner to confirm that he is unconscious. Medical personnel use standard clinical techniques to assess consciousness, such as checking for movement, opened eyes, eyelash reflex, pupillary responses or diameters, and response to verbal commands and physical stimuli. In addition to examining the prisoner, medical personnel inspect the catheter site(s).

4. In the unlikely event that the prisoner is still conscious, thiopental is injected from syringes 1A, 2A, 3A, and 4A (5 grams) into the secondary IV line. Approximately 30 cc of the saline solution in syringe 5A is injected. Medical personnel confirm that the prisoner is unconscious as directed in paragraph E.3. When the secondary line is used for thiopental, it is also used for the remaining chemicals.

5. After confirming that the prisoner is unconscious, the second and third chemicals are injected provided at least three minutes have elapsed since the execution team members started injecting the thiopental which rendered the prisoner unconscious.

6. The pancuronium bromide in syringe 6 (60 milligrams) is injected into the prisoner.

7. The saline solution in syringe 7 (30 cc) is injected.

8. The potassium chloride in syringes 8 and 9 (240 milliequivalents) is injected.

9. The saline solution in syringe 10 (60 cc) is injected.

10. If the electrical activity of the prisoner's heart does not cease within five minutes, additional potassium chloride is injected to cause death.

11. When all electrical activity of the heart ends as shown by the electrocardiogram, medical personnel pronounce death.

F. Documentation of chemicals

1. Medical personnel properly dispose of unused chemicals.

2. Before leaving ERDCC, all members of the execution team complete and sign the "Sequence of Chemicals" form thereby verifying that the chemicals were given in the order specified in this protocol.

3. Before leaving ERDCC, medical personnel complete and sign the "Chemical Log" indicating the quantities of the chemicals used and the quantities of the chemicals discarded during the execution.

4. Within three days of the execution, the ERDCC superintendent submits the Sequence of Chemicals and the Chemical Log to the director of the Division of Adult Institutions. The DAI division director and the department director review the records. If they do not detect any irregularities, they approve the two documents. If any irregularities are noted, the DAI division director promptly determines whether there were any deviations from this protocol and reports his findings to the department director.

July 14, 2006

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

Civil Cover Sheet

This automated JS-44 conforms generally to the manual JS-44 approved by the Judicial Conference of the United States in September 1974. The data is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. The information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is authorized for use only in the Western District of Missouri.

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II. Basis of Jurisdiction: 3. Federal Question (U.S. not a party)

III. Citizenship of Principal Parties (Diversity Cases Only)
Plaintiff:- N/A
Defendant:- N/A

IV. Origin : 1. Original Proceeding

V. Nature of Suit: 550 Civil Rights

VI.Cause of Action: 42 USC sec. 1983

VII. Requested in Complaint
Class Action:
Dollar Demand: Injunction
Jury Demand: No

VIII. This case IS RELATED to Case Number 05-4173-CV-FJG assigned to Judge Gaitan

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Signature: eoc

Date: 7/9/07

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No. 09-1274
Capital Case

Supreme Court, U.S.
FILED
MAY 28 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

REGINALD CLEMONS, et al.,
Petitioners,

v.

LARRY CRAWFORD, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION

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STATEMENT OF THE CASE

Procedural History

Four petitioners, Reginald Clemons, Richard Clay, Jeffrey Ferguson, and Roderick Nunley, Missouri prisoners with death sentences, filed this action in the United States District Court for the Western District of Missouri on July 9, 2007 (App. to Pet. -- hereinafter App. -- page 68a). Petitioners named as defendants Larry Crawford, former Director of the Missouri Department of Corrections; James Purkett, former Superintendent of the Eastern Reception Diagnostic and Correctional Center; and Terry Moore, former Director of the Division of Adult Institutions (App. 34a). Also named as defendants were John Does 1-50, identified as unknown persons who will participate in the offenders' execution, but no Does have since been identified or served. Four additional petitioners, Michael Taylor, Martin Link, Mark Christeson, and William Roussan, were joined as plaintiffs during the course of the litigation. Three petitioners, John Middleton, Russell Bucklew, and Earl Ringo, were denied leave to intervene in the litigation by the district court (App. 3a).

The complaint claimed that Missouri's implementation of its method of execution was unconstitutional because of the risk that the lethal chemicals may be improperly prepared or administered by unqualified and untrained personnel (App. 58a). Petitioners prayed for a declaration that the lethal injection procedure violated the Eighth and Fourteenth Amendments, and they prayed for the court's order permanently

enjoining Missouri from conducting executions under the written protocol and enjoining Missouri from employing untrained, unqualified, or unfit personnel to discharge the medical responsibilities involved with lethal injection (App. 63a). Following this Court's opinion in *Baze v. Rees*, 553 U.S. 35 (2008), Missouri moved for judgment on the pleadings because Missouri's written lethal injection protocol (attached to the complaint as Exhibit A (App. 67a-71a)) provided more stringent safeguards against the risk of pain than did the Kentucky protocol that had just been upheld in *Baze*. In its July 15, 2008 order, the district court compared Missouri's protocol with the Kentucky protocol and found the qualifications of the medical personnel comparable (App. 23a-24a). The court of appeals affirmed the judgment of the district court (App. 1a) and denied rehearing en banc (App. 32a).

Missouri's Protocol

In Missouri, as in Kentucky, execution of a death sentence is carried out by the successive administration of three chemicals: thiopental renders the prisoner unconscious; pancuronium bromide renders the prisoner unable to move; and potassium chloride causes the prisoner's heart to stop (App. 5a-6a).

Missouri's lethal injection protocol requires a physician, nurse, or pharmacist to prepare the chemicals used during the lethal injection (App. 68a). A physician, nurse, or emergency medical technician (EMT) who has appropriate training, education, and experience in the setting of intravenous lines (IVs) sets the IVs into the condemned, monitors the condemned, and supervises the injection of lethal

chemicals by the members of the execution team (App. 68a-70a). Both primary and back-up IVs are set (App. 69a).

The protocol requires administration of five grams of thiopental in 200 ccs (cubic centimeters) of solution, a 30 cc saline flush, 60 mg of pancuronium bromide in 60 cc solution, a 30 cc flush, 240 miliequivalents of potassium chloride, followed by a 60 cc flush (App. 68a). A second set of syringes containing an additional five grams of thiopental is prepared for use in the unlikely event the condemned prisoner is still conscious after receiving the initial five grams of the chemical (App. 69a). The protocol sets out procedures to document the chemicals used during the execution process (App. 71a).

Following administration of the thiopental, a medical professional (physician, nurse, or EMT) enters the execution chamber to inspect the IV site (App. 70a). The medical professional uses standard clinical techniques to assess consciousness, such as checking for movement, opened eyes, eyelash reflex, pupillary responses or diameters, and response to verbal commands and physical stimuli (App. 70a). In the unlikely event the condemned is still conscious, the additional five grams of thiopental are injected, and the medical professional then examines the condemned again (App. 70a). Once the condemned is unconscious and three minutes have elapsed from the injection of thiopental, the remaining chemicals are injected (App. 70a). If the condemned's heart does not cease activity within five minutes, then additional potassium chloride is injected (App. 70a). When electrical activity of the heart ceases, medical personnel pronounce death (App. 70a).

The court of appeals upheld the constitutionality of Missouri's lethal injection procedure in *Taylor v. Crawford*, 487 F.3d 1072, 1085 (8th Cir. 2007), *cert. denied*, 128 S.Ct. 2047 (2008). Missouri's procedure is substantially similar to Kentucky's procedure that this Court upheld in *Baze* (App. 10a-14a; 23a-25a).

ARGUMENT

This appeal in large part reduces to this question: Whether it is cruel and unusual punishment for a state to carry out an execution by means of a judicially approved lethal injection protocol that requires licensed and experienced medical personnel to: (1) prepare the lethal chemicals; (2) set the IVs through with which the lethal chemicals are administered; (3) observe the injection of the lethal chemicals into the IV lines; and (4) enter the execution chamber after administration of the first chemical (thiopental) which causes unconsciousness, to check the IV site for any problems and to examine the condemned prisoner to confirm that he is unconscious and thereby, insensate to any pain that the second and third chemicals could cause to a conscious person. Under *Baze v. Rees*, where safeguards such as these are incorporated into a lethal injection procedure, that procedure is constitutional as a matter of law. Any factual challenge to the particular qualifications and training of execution personnel is not material to the legal conclusion whether the lethal injection procedure violates the Eighth Amendment.

The court below examined petitioners' complaint (App. 34a) in detail. In essence, petitioners alleged that Missouri would violate their Eighth Amendment rights because Missouri's execution protocol would be implemented by incompetent or unfit medical personnel. Petitioners theorized that because the Department of Corrections has used unfit medical personnel in the

past,[1] it will use unfit medical personnel in the future (Petition, pages 20-22).[2] In resolving petitioners' claim, the court below relied on two decisions: *Baze v. Rees*, and *Taylor v. Crawford*, 487 F.3d 1072 (8th Cir. 2007). From *Baze*, the court below identified the legal standard by which to judge the complaint as follows:

> "[T]he constitution does not demand the avoidance of all risks of pain in carrying out executions." [*Baze*, 128 S.Ct. at 1529]. Instead, to establish an Eighth Amendment violation, "the conditions presenting the risk must be '*sure or very likely* to cause serious illness and needless suffering' and give rise to

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[1] Since the filing of the lawsuit, the named respondents are no longer in their positions. Moreover, the executive with responsibility over the Missouri Department of Corrections, the Missouri Governor, has also changed. And, Dr. Doe, the prior complained-of doctor, is no longer involved with Missouri executions (App. 15A). There are no allegations in the complaint that the alleged bad decisions were somehow institutional as compared to individual.

[2] Of course, the premise of this contention was rejected in the Eighth Circuit's 2007 *Taylor* decision. Not only was Dr. Doe no longer participating in the protocol, but when he participated previously, he had still given a large dose of thiopental, almost ten times the amount needed for surgery (App. 4a n.5 quoting *Taylor*, 487 F.3d at 1076). There was no evidence that any Missouri condemned had suffered any unnecessary pain (App. 4a n.6).

> 'sufficiently *imminent* dangers.'" *Id.* at 1530-31 (quoting *Helling v. McKinney*, 509 U.S. 25, 33, 34 (1993)). "[T]o prevail on such a claim there must be a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" *Id.* at 1531 (quoting *Farmer v. Brennon*, 511 U.S. 825, 842, and 846 n.9 (1994)).

(App. 9a).[3]

After identifying the legal standards set forth in *Baze* (App. 9a), the court discussed this Court's application of that standard to the facts in *Baze* (App. 10a-12a). In *Baze*, there was no substantial risk of serious harm from allowing non-medical personnel to mix thiopental because it was a simple process to mix (App. 10a). There was no substantial risk of harm due to problems related to the IV line because of safeguards implemented by Kentucky's protocol: Members of the IV team must have at least one year of professional experience such as a certified medical assistance, phlebotomist, EMT, paramedic or military corpsman (App. 11a quoting 128 S.Ct. at 1533). And setting a back-up IV line, a consciousness check by the Warden and Deputy Warden, and an IV check combined to lower the risk

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[3] Petitioners do not suggest that the court below used a legal standard other than that adopted in *Baze* (Petition, pages 23-24). Petitioners' only contention is that the court below misapplied *Baze*, not that the *Baze* framework should be revisited.

of maladministration to a point where it could not "remotely be characterized as 'objectively intolerable.'" (App. 12a quoting *Baze*, 128 S.Ct. at 1537.

Following the teachings of this Court, the court below examined Missouri's protocol. Unlike Kentucky, in Missouri a physician, nurse, or pharmacist prepares the thiopental (App. 12a). Medical personnel watch the condemned for signs of IV problems (App. 12a). Medical personnel enter the execution chamber to check for signs of consciousness (App. 12a). A physician, nurse, or EMT with appropriate training, education, and experience sets the IV (App. 12a). A back-up IV is set as well (App. 12a). An additional five grams of thiopental is prepared in the unlikely event the prisoner is still conscious after receiving the first dose (App. 12a). The medical personnel do not have the discretion to vary the amount of the chemicals without prior approval from the Director of the Department of Corrections (App. 12a-13a).

Petitioners contend that the complaint was sufficient to withstand judgment on the pleadings, even after *Baze* (Petition, pages 18-23). Petitioners reason that there is a substantial risk of serious harm because Missouri employs "incompetent personnel to carry out executions"[4] (Petition, pages

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[4] As the court of appeals noted, petitioners did not (and does not in the petition) define the terms "competent" or "incompetent" in any meaningful fashion (App. 13a n.7). That failure to define the terms is perhaps intentional so that petitioners or

18-19). Petitioners' theory is that Missouri formerly used a person petitioners deem incompetent; therefore, Missouri will always hire incompetent personnel (Petition, page 19).

That theory fails for at least four reasons set out by the court of appeals. First, petitioners made no factual allegations suggesting "incompetence, lack of necessary qualifications, or inadequate training on the part of any current or prospective member of Missouri's execution team" (App. 14a-15a). In their petition, petitioners do not disagree with this conclusion. Second, the complaint did not allege that any current or prospective member of the execution team "would intentionally or unintentionally deviate or ignore the written protocol." (App. 15a). Again, petitioners do not contend that this conclusion is erroneous (Petition, pages 18-23). Third, petitioners' criticism of the previous execution team leader, Dr. Doe (Petition, page 19), is unavailing because Dr. Doe "no longer participates in executions in Missouri" (App. 15a). And the cause of the alleged problems, an unwritten protocol, is no longer exists (App. 15a). The protocol is now in writing (App. 68a-71a).

Further, the court of appeals concluded that even if Dr. Doe were labeled as incompetent, that "does not support an inference any member of Missouri's current execution team is 'incompetent' or 'unqualified.'" (App. 15a). Simply put, past performance does not guarantee future results. That is particularly true where those on whom petitioners

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others can argue in subsequent suits that current or future medical personnel are not competent.

blame past hiring no longer serve in their roles with the Department. *See* note 1, *supra*.

And as noted by the court of appeals (App. 12a-13a), the Missouri written protocol has safeguards to prevent needless suffering. Most notable here, licensed medical professionals prepare the chemicals, set the IV's and oversee the injection of the chemicals. Because these individuals are licensed to provide their services to the general public, they should not be said to be unqualified to provide services at an execution. This is true regardless of details of their background, including where they may have gone to school, what their grades were, whether they have published papers, where they have been employed, what their professional responsibilities might have been, whether they have been sued for malpractice before, whether they have been professionally disciplined before, or whether they have a criminal history. Missouri medical team members are all currently licensed in their respective professions and experienced in the use of IV's.

The court of appeals identified an additional safeguard. If there were a problem with the preparation or administration of the thiopental that resulted in the prisoner's not losing consciousness, Missouri's protocol suspends the execution. After the injection of the thiopental, a licensed medical person enters the execution chamber to ensure that the IV is working properly and to administer standard techniques to confirm that the prisoner is unconscious before the injection of the second and third chemicals begins. This direct assessment of the IV site and the prisoner after administration of the thiopental is a fail safe that will protect the offender

from an objectively intolerable risk of unnecessary and wanton pain.

Petitioners suggest that the court of appeals' decision immunizes states from Eighth Amendment scrutiny (Petition, page 23). The court of appeals rightly rejected that assertion (App. 16a-17a). The lower court stated that *Baze* did not prohibit review of a lethal injection protocol (App. 16a). Instead, the district court and the court of appeals merely held that the complaint before it was properly resolved as a matter of law (App. 17a). A complaint could present allegations allowing factual development, but this one did not (App. 17a).

The essence of petitioners' allegation is that improper past practices support an inference that the current execution team is "incompetent." (Petition, page 22). The court of appeals rejected that inference. "The mere allegation Missouri employed an 'incompetent' and 'unqualified' individual in the past simply does not support the prisoner's allegation Missouri will employ 'incompetent' and 'unqualified' personnel in the future" (App. 15a). This conclusion is consistent with these of other courts that have reviewed this type of allegation. Recently, the Court of Appeals for the Third Circuit reviewed claims concerning Delaware's protocol and catalogued the cases upholding lethal injection even though there was allegedly a mistake in its administration at some earlier point. *Jackson v. Danberg*, 594 F.3d 210, 225-26 (3rd Cir. 2010) citing *Cooey v. Strickland*, 589 F.3d 210, 224 (6th Cir. 2009); *Clemons v. Crawford*, 585 F.3d 1119, 1127 (8th Cir. 2009); *Emmett v. Johnson*, 532 F.3d 291, 307 (4th Cir. 2008); *Schwab v. State*, 995 So.2d 922, 926-28 (Fla. 2008) (per curiam). These decisions are consistent

with this Court's statement in *Baze* that a single instance of mistake does not suffice to demonstrate a substantial risk of serious harm. 128 S.Ct. at 1531.

Petitioners seem to contend that there is some split of authority among the lower courts concerning application of *Baze* at the pleading stage (Petition, pages 25-29). Petitioners do not refer the Court to a case with a different result, a federal court of appeals reversing the grant of judgment on the pleadings (Petition, pages 25-29). There is no split of authority on the topic.

Petitioners confirm that the state's position has support elsewhere, citing *Raby v. Livingston*, 2010 WL 909097 (5th Cir. Mar. 15, 2010) (Petition, pages 25-26). Along with *Raby*, petitioners could have listed *Jackson v. Danberg*, 594 F.3d at 210. In *Jackson*, Delaware revised its lethal injection protocol and immediately moved for summary judgment on the theory that its protocol was substantially similar to the one this Court found constitutional in *Baze*. *Id.* at 214. The district court rejected the offender's invitation to "assume that future conduct by different personnel under a new lethal injection protocol in a different legal environment will reflect past conduct by former personnel under a now rejected protocol." *Id.* at 215 quoting *Jackson v. Danberg*, 601 F.Supp.2d 589, 598 (D. Del. 2009).

To show an alleged split, petitioners refer the Court to two Sixth Circuit decisions: *Reynolds v. Strickland*, 583 F.3d 956 (6th Cir. 2009) and *Jones v. Bradshaw*, No. 07-3766 (6th Cir. Jan. 30, 2009) (Petition, pages 26-27).

As to *Reynolds*, petitioners acknowledge that it is a stay-of-execution case (Petition, page 26) that would involve a four factor test. *See Cooey v. Strickland*, 589 F.3d 210, 218 (6th Cir. 2009) (listing stay factors in Sixth Circuit). The appellate court in *Reynolds* rejected Ohio's statute-of-limitations defense to the section 1983 suit. 583 F.3d at 956-57. The court of appeals went on and issued the stay of execution for what seemed to be public interest reasons without discussing the merits. *Id.* at 957. There is no holding in *Reynolds* that conflicts with the decision of the court below.

Further, the facts in *Reynolds* differ from those here. Ohio had "revised its execution protocol in May, 2009 and experienced serious and troubling difficulties in executing at least three inmates." *Id.* at 957. In contrast, Missouri has adopted a written protocol -- at the order of a federal district court (App. 5a). And before the adoption of the written protocol, "there was not a scintilla of evidence that any prisoner ever suffered any pain other than what was necessary to acquire access to the prisoner's circulatory system through the insertion of the needed intravenous lines." (App. 4a n.6, quoting *Taylor v. Crawford*, 487 F.3d at 1075).

Petitioners also fail to show that *Jones v. Brandshaw* is inconsistent with the decision of the court below. Petitioners refer the court to page 844 of the district court opinion (Petition, page 27 citing *Jones*, 489 F.Supp.2d at 844). On this page, there is, *inter alia*, a generic allegation that the death penalty violates the Eighth Amendment prohibition against cruel and unusual punishment, which the district court rejected on the basis of *Gregg v. Georgia*, 429 U.S. 875 (1976). In the Sixth Circuit order of

January 30, 2009, the cause was remanded "for limited discovery and factual development of the lethal injection issue." *Jones v. Bradshaw*, No. 07-3766 (6th Cir. Jan. 30, 2009). Assuming "the lethal injection issue" is the same as the one in the current case, it is significant that Ohio did not oppose a remand. If Ohio conceded that the allegations were sufficient, then the January 30, 2009 order from the Sixth Circuit is unsurprising. In contrast, Missouri has not conceded, and to the contrary, the court below has determined that the allegations in the complaint are insufficient. The two paragraph order in *Jones* fails to demonstrate divergent authority.

Finally, petitioners suggest that federal district courts have had divergent results in their application of *Baze* (Petition, pages 27-29). Assuming that suggestion is true, resolution of that divergent authority is a matter best left for the courts of appeals. This Court should not exercise its discretionary review to resolve a controversy that, in the end, may not exist. This is manifested in Rules 10(a) and 10(c) where the Court indicates that its decision on certiorari review is informed by divergence between federal courts of appeals and state high courts, not state and federal trial courts.

CONCLUSION

Respondent respectfully requests the Court deny the petition for writ of certiorari.

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No. 09-1274

IN THE

Supreme Court of the United States

REGINALD CLEMONS, ET AL.,
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LARRY CRAWFORD, ET AL.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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INTRODUCTION

The question presented by this petition is straightforward: whether detailed allegations of incompetence by Respondent ("DOC") officials state a claim that Petitioners face a substantial risk that they will suffer serious harm in the course of their executions. The DOC argues that the allegations are insufficient because "past performance does not guarantee future results." Br. in Opp. at 9. But the test at the pleadings stage is not whether Petitioners are "guaranteed" to face a substantial risk; it is whether such a risk is plausibly inferred from the allegations. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

Missouri's immediate "past performance" with executions has been uniquely disturbing. Petitioners have alleged that incompetence of the grossest kind was tolerated and ignored by DOC officials, the very administrators who have chosen the DOC's current execution team. The DOC candidly states its belief that it does not matter whether its execution personnel "have been professionally disciplined before or whether they have a criminal history" so long as they hold professional licenses. Br. in Opp. at 10. It is that approach to execution personnel that allowed Doe I, a licensed surgeon, to commit malfeasance. And it is, at the very minimum, plausible to conclude in light of Petitioners' allegations that the DOC continues to employ incompetent and untrained personnel. Any other conclusion would amount to presuming that the DOC has changed course in the face of credible allegations

to the contrary. The DOC is entitled to no such presumption at the pleadings stage.

Because the lower courts' error of law is clear and discrete, this case is appropriate for summary reversal and remand for continuing proceedings. Alternatively, Petitioners ask that this Court set the case for plenary consideration on the merits so that the lower courts may have additional guidance about the type of allegations that state a claim under *Baze v. Rees*, 553 U.S. 35 (2008).

ARGUMENT

I. Contrary To The DOC's Assertions, The Decision Below Conflicts With This Court's Rule 8 And Method-Of-Execution Jurisprudence.

The DOC's contention that Petitioners have failed to make out plausible allegations is incorrect. As explained in our Petition, Petitioners have made detailed allegations of substantial and pervasive incompetence and malfeasance at the DOC in the immediate past. These allegations include the fact that the DOC's prior team leader dramatically reduced the amount of thiopental given to inmates; that the DOC employed this physician knowing that he had been barred from practicing at area hospitals; and that the DOC continued to tout his supposed competence even after his malfeasance was publicly revealed. Petition at 18-21.

1. The DOC contends that this case "in large part reduces" to the question of whether the DOC's protocol is constitutional, but that is a red herring. Br. in Opp. at 6. Petitioners have not challenged the

constitutionality of the DOC's written protocol; instead they have alleged that the personnel charged with implementing the protocol are incompetent and are either incapable of or unwilling to carry out the protocol properly. The Eighth Circuit did not dispute that incompetent personnel would pose a constitutionally material risk of substantial harm. Pet. App. 14a-16a To the contrary, the Eighth Circuit emphasized that it was "imperative" the DOC employ competent personnel. Pet. App. 16a. Thus, when the DOC contends that "[a]ny factual challenge to the particular qualifications and training of execution personnel is not material," it is ignoring both law and logic. Br. in Opp. at 5. The DOC's protocol is only as good as the personnel who carry it out, and it is their competence that this case concerns.

2. The DOC has far less to say about the real issue in the case: whether Petitioners' detailed allegations of incompetence clear the plausibility threshold imposed by Fed. R. Civ. P. 8. The DOC does not and cannot dispute the malfeasance that took place in the immediate past. But it observes that other courts have refused to grant relief in method of execution challenges where the plaintiff had alleged past misconduct. Br. in Opp. at 11. Those cases, however, demonstrate the error of the decision below, because none of them was decided at the pleadings stage; instead all of them were decided at a later stage on the basis of record evidence. For example, the primary case that the DOC focuses on, *Jackson v. Danberg*, 594 F.3d 210, 224 (3d Cir. 2010), was reviewed after summary judgment. *Id.* at 223

("To survive summary judgment under *Baze*, the Plaintiffs must point to record evidence from which a reasonable fact finder could infer [a basis for a violation]."). The result in that case turned not on the insufficiency of the pleadings, but on plaintiffs' "evidentiary deficiency" in failing to prove that past inmates had suffered harm. *Id.* at 225 (holding that the importance of that "evidentiary deficiency" "cannot be understated").[1] Likewise, all the other cases that the DOC cites were not decided on the pleadings. *Emmett v. Johnson*, 532 F.3d 291, 297 (4th Cir. 2008) (summary judgment); *Cooey v. Strickland*, 589 F.3d 210, 218 (6th Cir. 2009) (stay); *Schwab v. State*, 995 So. 2d 922, 924-25 (Fla. 2008) (per curiam) (post-conviction review).

It is one thing to conclude after discovery that a plaintiff has failed to substantiate his allegations of incompetence. *Cf. Jackson*, 594 F.3d at 229 ("In sum, *on this record* we are compelled to conclude that the Plaintiffs have failed to show [an Eighth Amendment violation]") (emphasis added). It is another to presume, as the lower courts wrongly did here, that those allegations lack merit before a record is developed.

Likewise, this Court's decision in *Baze v. Rees*, 553 U.S. 35 (2008), does not justify the result below.

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[1] The *Jackson* Court used the word "understated," but from context it is clear it meant "overstated." The full sentence from the opinion is: "The importance of that evidentiary deficiency cannot be understated, since the constitutionality of Kentucky's protocol rested on the effective anesthetization of an inmate, as both the plurality and the dissent in *Baze* recognized." 594 F.3d at 225.

The DOC fails to address, let alone refute, Petitioners' argument that *Baze* was decided on a full trial record that revealed no shortcomings on the part of the Kentucky's execution team. Petition at 23-24. *Baze* presumably would not have come out the same way if that trial record had instead revealed, for example, that team members were drastically reducing the amount of thiopental they administered to inmates. To the contrary, the *Baze* plurality concluded that "failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk" of pain and suffering. 553 U.S. at 53. The *Baze* plaintiffs failed to prove such a risk existed after having the benefit of a fully-developed record. Their failure to develop such evidence necessarily does not make Petitioners' allegations insufficient as a matter of law.

3. The DOC also advances a cluster of arguments urging this Court to presume that because the DOC no longer employs Doe I, it has turned over a new leaf and no longer has a problem with incompetent personnel. Br. in Opp. 9-10. But that is the very question at issue in the complaint, and it cannot be presumed in the defendants' favor at the pleadings stage. Instead, Petitioners' allegations of incompetence must be credited so long they have "facial plausibility." *Iqbal*, 129 S. Ct. at 1949. Petitioners' complaint easily clears this standard, notwithstanding the DOC's arguments to the contrary.

The DOC attempts to recast Petitioners' allegations as going to Doe I's fitness, when in fact

Petitioners have alleged systemic problems with the DOC's recruitment and training of personnel For although Doe I no longer performs executions for the DOC, the same DOC personnel who recruited Doe I and defended his competence are the personnel who retained the DOC's current team. The DOC emphasizes that it now has a new Director, Br. in Opp. at 9-10, but it neglects to mention that the old Director was responsible for the retention of the current team. The same Director who found Doe I to be a "bright" "professional," and who retained him knowing that he had been barred from practicing at area hospitals, is the individual who selected the current team.[2] Nor does the record reveal any material changes post-complaint to execution team retention and training procedures.

Furthermore, post-Doe I, the DOC sought execution dates for Petitioners even before it had an execution team in place. Petition at 7-8. The Missouri Supreme Court declined to set execution dates at that time, but if it had, the execution date would traditionally have been within approximately 30 days, giving the DOC inadequate time to hire and train an execution team to carry out a new and untested protocol. Such actions are inconsistent with a commitment to providing competent personnel. Indeed, the DOC has freely conceded throughout this litigation that it considers licensed team members to

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[2] Respondent Crawford remained in his position as DOC Director until shortly before Missouri's current governor took office in January 2009. The current execution team members were chosen in the spring of 2008, more than a year earlier. Petition at 12.

be competent "regardless whether they have been professionally disciplined before or whether they have a criminal history." Br. in Opp. at 10. *See also Clemons v. Crawford*, No. 07-CV-4129, Motion for Judgment on the Pleadings at 12-13 (Dkt. 47) (W. D. Mo. Apr. 25, 2008). This view is emblematic of the DOC's continued and misguided approach to the evaluation of team member competency. Just as the DOC stood behind Doe I, a licensed surgeon, even in the face of incontrovertible evidence of his malfeasance, it continues, post-Doe, to persist in the dangerous view that past criminal conduct and professional discipline are irrelevant to a team member's suitability to perform executions.[3]

Ultimately, the question this case presents is whether it is implausible to infer, at the pleadings stage, that the DOC's well-documented problems with retaining competent personnel in the immediate past by the same officials have continued. If Petitioners' targeted and detailed allegations of systemic problems are insufficient then there truly is no set of allegations that would pass muster. The DOC contends that the ruling below does not foreclose all lethal injection claims, Br. in Opp. at 11, but it surely does because it holds that even when the DOC has had serious problems in the past, it can be presumed at the pleadings stage to have fixed

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[3] While it goes beyond the allegations of the complaint, it became apparent after the complaint was filed that the DOC is currently employing a team member, Doe II, who was convicted of aggravating stalking. Petition at 9, n.3. The DOC has never disputed that Doe II served on the execution team under Doe I and apparently failed to bring Doe I's malfeasance to the DOC's attention.

those problems as a matter of law. That presumption cannot be reconciled with this Court's basic teachings about the standards for a motion to dismiss, and it should be rejected.

II. Contrary To The DOC's Assertions, A Substantial Split Of Authority Exists Regarding The Type Of Allegations That State A Claim Under *Baze*.

The DOC is also incorrect to claim that the lower courts are in agreement about what is necessary to state a claim in a method-of-execution challenge post-*Baze*. The DOC asserts that the Sixth Circuit's decision in *Reynolds v. Strickland* is not at odds with the Eighth Circuit's decision here, but that is incorrect. The plaintiff in *Reynolds* obtained a stay of execution -- a standard that, unlike a motion on the pleadings, requires a showing of likelihood of success -- because of the "serious and troubling difficulties" Ohio had exhibited during three past executions. 583 F.3d 956, 956-57 (6th Cir. 2009). While the decision's reasoning was somewhat terse, it is plain that the court concluded that the plaintiff's challenge to, among other things, the "competency of execution team," had a sufficient likelihood of success in light of Ohio's past problems in carrying out executions. *Id.* at 957. That claim is analogous to the one here, and the case would have come out the other way in the Eighth Circuit.

The DOC also argues that Missouri, unlike Ohio, had not actually experienced material problems in its past executions. Ohio's primary problem was that its personnel had trouble placing an IV line in a

particular inmate. *See* Br. in Opp. at 13. That is a far more benign problem than the DOC's practice of arbitrarily and dramatically reducing the amount of thiopental it provided to inmates. And while the Eighth Circuit previously found that it could not affirmatively conclude that those inmates suffered pain, it also recognized that under the DOC's procedures, no signs of pain would be visible. "There is no dispute, however, that the [potassium chloride] *will* cause excruciating pain if the inmate is not adequately anesthesitized and that the use of the [pancuronium bromide] *will simultaneously mask any visible sign of that pain*." *Taylor v. Crawford*, 487 F.3d 1072, 1082 (8th Cir. 2007) (second emphasis added). At bottom, the *Clemons* and *Reynolds* Courts simply disagree about whether past misconduct can be a basis for alleging a substantial risk of future injury.[4]

The DOC is also unpersuasive in contending that the district court cases that have denied motions to dismiss on far less detailed allegations are immaterial. As Petitioners explained, these cases should be taken to evince an important split of authority because the denial of a motion to dismiss is generally not reviewable by a Court of Appeals. Thus, the DOC's stock admonition that the "resolution of that divergent authority is a matter

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[4] Respondents also fail to distinguish *Jones v. Bradshaw*, the other Sixth Circuit case cited by Petitioners. While it is true that Ohio did not oppose a remand for an evidentiary hearing, the Sixth Circuit would have had ample authority to have denied the COA or to have denied the petitioner's motion to remand. The fact that it did not is inconsistent with the result here.

best left for the courts of appeals," is misplaced. Br. in Opp. at 14. This Court should take the opportunity to resolve that "divergent authority."

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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